

FEB 27 1969

Appellee

John F. Dwyer, Clerk

Supreme Court of the United States

October Term, ~~1969~~ 1970

No. ~~402~~ 42

EVELYN J. YOUNGERS,

Appellant,

v.

JOHN HARRIS, JR., et al.,

Appellees.

Appeal from the United States District Court
for the Central District of California.

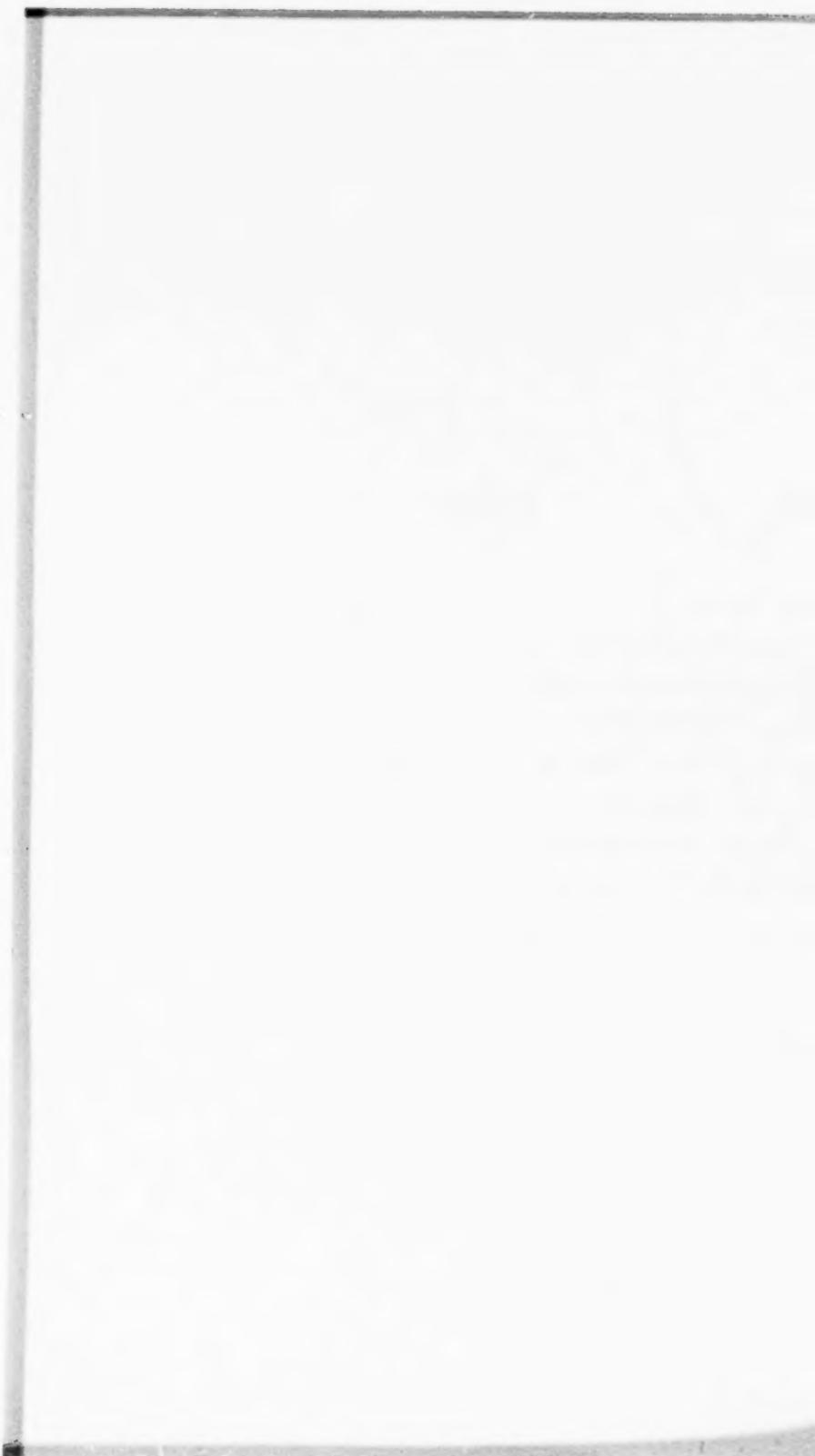
Appeal Doctored June 6, 1969

Probable Jurisdiction Notified January 13, 1969



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**United States District Court
Central District of California**

Civ. Action No. 67-1041-WPG

John Harris, Jr., Plaintiffs,
vs.
Evelle J. Younger, Defendant.

RELEVANT DOCKET ENTRIES

July 21, 1967—Complaint for injunction for alleged denial of civil rights (three-judge court requested) filed.

August 9, 1967—Hearing on plaintiff's motion for appointment of three-judge court argued and granted. Further order enjoining State court prosecution.

August 8, 1967—Temporary restraining order and document of notification and certificate filed.

October 27, 1967—Hearing on complaint for injunction and defendant's motion to dismiss argued and ordered submitted; preliminary injunction to remain in effect.

March 11, 1968—Memo of opinion and order thereon denying defendant's motion to dismiss; preliminary injunction and order thereon that defendant is enjoined and restrained from further prosecution of current criminal action against plaintiff John Harris, Jr., is filed.

April 9, 1968—Defendant's notice of appeal and proof
of service thereon filed.

United States District Court
Central District of California

Civil No. 67-1041-WPG

(Title Omitted in Printing)

COMPLAINT FOR INJUNCTION
(Three-Judge Court Requested)

Plaintiffs Allege:

I

The Jurisdiction of this Court is invoked under Title 28 U.S.C. 1331. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$10,000.00, and arises under the Constitution and laws of the United States and, particularly, under the free speech and press, the right to petition for redress of grievances, with due process provisions and the equal protection provisions of the First and Fourteenth Amendments of the United States Constitution.

The jurisdiction of this Court is also invoked under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3), this being an action to redress the deprivation under color of statute, ordinance, regulation, custom and usage of rights, privileges and immunities secured to plaintiffs by the First and Fourteenth Amendments to the United States Constitution.

The jurisdiction of this Court is further invoked under Title 28 U.S.C. 2281 and 2284.

II

Plaintiff John Harris, Jr., is a citizen of the State of California and of the United States and a resident within this judicial district.

Plaintiffs Jim Dan and Diane Hirsch are citizens of the State of California and of the United States, residents within this judicial district and members of the Progressive Labor Party, an organization which advocates the replacement of capitalism by socialism, ownership of the means of production by the working people of the country and the abolition of the profit system and the creation of political institutions organized and operated by and in behalf of the overwhelming majority of the people in the Nation.

Plaintiff Farrell Broslawsky is a citizen of the State of California and of the United States and a resident within this judicial district. He is an instructor in history at Los Angeles Valley College.

III

Defendant Evelle J. Younger is sued herein in his capacity as District Attorney of the County of Los Angeles, State of California. Defendant has the responsibility under the Constitution and laws of the State of California for the securing of indictments and the institution and prosecution of criminal prosecutions involving violations of the criminal laws of the state.

IV

California Penal Code Sections 11400 and 11401, hereinafter referred to as the California Criminal

Syndicalism Act, provide as set out in Appendix A attached to this complaint, which sections are referred to herewith and incorporated herein as though fully set forth.

V

The provisions of the aforesaid statutes on their face, are void and illegal in that they violate the Constitution of the United States and, in particular the First and Fourteenth Amendments thereto. They violate the fundamental guarantees of free speech, press, assembly and the right to petition the Government for redress of grievances. They operate as a prior restraint upon freedom of expression and the circulation of the press. They violate the guarantee of due process of law in that the statutes are so vague and indefinite as to fail to meet the requirement of certainty in criminal statutes. They invade areas preempted by exclusive jurisdiction of the United States statutes and laws enacted by the Congress of the United States and, therefore, also violate the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

VI

Plaintiff, John Harris, Jr., has been charged with and subjected to indictment for violation of the California Criminal Syndicalism Act for distributing and circulating leaflets bearing the imprint of the Progressive Labor Party allegedly in violation of said Act and is presently being prosecuted in the Superior Court of the State of California for the County

of Los Angeles pursuant to said indictment by the defendant Younger through a Deputy District Attorney under the direction and control of defendant.

By reason of said prosecution and the presence of said Act, plaintiff Harris is inhibited in the exercise by him of First Amendment rights.

Plaintiffs Jim Dan and Diane Hirsch, as members of the Progressive Labor Party, advocate doctrines and precepts seeking change in industrial ownership and control and effecting political change; and they feel inhibited in attempting through peaceful, non-violent means to advocate the program of the Progressive Labor Party as above set forth, by reason of said Criminal Syndicalism Act, and the prosecution thereunder of the plaintiff Harris.

Plaintiff Broslawsky, in his capacity as instructor of history, teaches about the doctrines of Karl Marx and reads from The Communist Manifesto and other revolutionary works as part of class work. By reason of the presence in the laws of California of the above set forth Criminal Syndicalism Act and the prosecution under it which has been brought against plaintiff Harris, he is uncertain as to what he may say and teach of such doctrines and works and feels inhibited in presenting materials to his students to the detriment both to himself as a teacher and to his students.

VII

Plaintiffs are and will continue to be subjected to irreparable injury, impairment and deprivation of

rights, privileges, and immunities secured to them by the Constitution and laws of the United States, more particularly, the right freely to exercise freedoms of speech, press, assembly, association, and to petition for redress of grievances under the First and Fourteenth Amendments to the United States Constitution, without having to fear the possibility of prosecution under the aforesaid state statutes, based upon their lawful exercise of First Amendment liberties, subsumed into the Due Process Clause of the Fourteenth Amendment as a limitation upon state action.

VIII

Prior to the filing of this complaint, plaintiff Harris sought in the above mentioned Superior Court, a dismissal of the indictment against him on the ground of the unconstitutionality of the said Criminal Syndicalism Act, under the United States Constitution, and filed a motion to that end under California Penal Code, Section 995. Said motion was denied by the Superior Court. Pursuant to California Penal Code 999a, said plaintiff Harris timely filed a petition for writ of prohibition in the California Court of Appeal, 2nd Appellate District, to prevent the trial of said action on the same grounds of the unconstitutionality of the Act. Said petition was denied by the Court of Appeal without opinion and the California Supreme Court denied a hearing.

IX

Unless this Court restrains the operation and enforcement of said Act, plaintiffs will suffer immediate

and irreparable injury for which they have no adequate remedy at law, namely, they will be deterred, intimidated, hindered and prevented from exercising their fundamental constitutional rights of freedoms of speech, press, assembly, association and to petition for redress of grievances guaranteed under the First and Fourteenth Amendments to the United States Constitution.

X

Wherefore, plaintiffs pray:

1. That pursuant to Title 28 U.S.C. 2281 and 2284, a three-judge Federal District Court be convened to hear and determine these proceedings;
2. That a permanent injunction issue restraining the defendant, his agents, servants, employees and attorneys from the enforcement, operation or execution of 11400 and 11401 of the California Penal Code;
3. That pending hearing and determination of the prayer of plaintiff for permanent relief, a temporary restraining order and a preliminary injunction issue restraining the defendant, his agents, servants, employees and attorneys, and all others acting in concert with him, from enforcing in any way the provisions of 1140 and 11401 of the California Penal Code, or from instituting, undertaking or prosecuting any proceedings whatsoever pursuant to said statutes against plaintiffs herein;

4. For costs of suit incurred herein.
 5. For such other and further relief as to the Court may seem just and proper.
- * * * * *

California Penal Code 11400:

“‘Criminal syndicalism’ as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”

California Penal Code 11401:

“Any person who:

“1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

“2. Willfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or;

"4. Organizes or assists in organizing, or is or knowingly becomes a member of any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Willfully by personal act or conduct practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change:

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

Appendix "A"

(Jurat and Affidavit of Service omitted in printing)

United States District Court
Central District of California

No. 67-1041-WPG

(Title Omitted in Printing)

TEMPORARY RESTRAINING ORDER

In the above matter, plaintiff's Motion for Order Appointing Three Judge Court having come on for hearing on August 4, 1967, the Hon. William P. Gray, judge presiding; plaintiffs being represented by Frank S. Pestana, A. L. Wirin and Fred Okrand, Esquires; defendant being represented by Robert J. Lord, Deputy District Attorney; and the Court having determined that the verified complaint on file herein presents a substantial federal constitutional question, namely, whether California Penal Code Sections 11400 and 11401 are unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution; and the Court, pursuant to 28 U.S.C. 2281 and 2284, having determined, since plaintiffs seek an injunction restraining the enforcement of said sections on the ground of said unconstitutionality, that the matter requires the convening of a three-judge court and the court having ordered the convening thereof;

The Court Finds, based upon the undenied verified complaint, that the plaintiff Harris has been indicted for violation of said sections and is presently being prosecuted in the Superior Court of the State of

California for the County of Los Angeles pursuant to said indictment by the defendant through a Deputy District Attorney under his direction and control;

The Court Further Finds, based upon said complaint and the representation of counsel for defendant in open court that unless restrained by this Court pending the determination of the matter by the three-judge court, said prosecution will go forward;

The Court Further Finds, based upon the above set forth facts and the principles set forth in *Dombrowski v. Pfister*, 380 U.S. 479, 486-487 that unless restraint against said prosecution pending said three-judge court determination is ordered, said plaintiff will suffer irreparable damage in that this Court's jurisdiction and the effectuation of its orders will be affected, and in that he will be forced to undergo protracted litigation, and to defend against a charge under said sections to which there is a substantial federal question as to whether they are unconstitutional on their face in violation of the free speech, free press, right to petition the government for redress of grievances and due process guarantees of the Constitution and thus exercise a chilling and deterring effect on the exercise of First Amendment rights which is not required in order for one to obtain adjudication as to the validity of such statutes;

It Is Therefore Ordered, pursuant to 28 USC 2284 (3), that pending hearing and determination by the aforesaid three-judge court, the defendant Evelle J. Younger, as District Attorney of the County of Los Angeles, California, his agents, servants, employees,

attorneys and all others acting in concert with him
are restrained from enforcing in any way the pro-
visions of sections 11400 and 11401 of the California
Penal Code and from instituting, undertaking or
prosecuting any proceedings whatsoever pursuant to
said statutes against the plaintiffs herein.

Dated: August 8, 1967

/s/ William P. Gray

Judge, United States District Court

(Affidavit of Service omitted in printing)

United States District Court
Central District of California

Civil No. 67-1041-WPG

(Title Omitted in Printing)

NOTIFICATION AND CERTIFICATE

To: The Honorable Richard H. Chambers,
Chief Judge, Court of Appeals, Ninth Circuit

Pursuant to the provisions of 28 U.S.C. 2284, you are notified that the complaint now pending in the above cause challenges the constitutionality of one or more laws of the State of California.

I certify that I have examined the complaint and have heard arguments advanced on behalf of both parties. In my opinion, this challenge requires the formation of a District Court of three judges, composed as designated in the hereinabove mentioned section.

Dated: August 4, 1967

/s/ William P. Gray
Judge, United States District Court

United States District Court
Central District of California

Civil No. 67-1041-WPG

(Title Omitted in Printing)

ORDER

To: Honorable Ronald Reagan, Governor of California, Sacramento, California;

Honorable Thomas C. Lynch, Attorney General of California, Sacramento, California;

A. L. Wirin, Esq., Fred Okrand, Esq., Los Angeles, California, and Frank S. Pestana, Esq., Hollywood, California, attorneys for the plaintiffs;

Evelle J. Younger, Esq., Harry Wood, Esq., and Robert J. Lord, Esq., Los Angeles, California, attorneys for the defendant.

Pursuant to the provisions of 28 U.S.C. 2284, you and each of you are hereby notified as follows:

1. The plaintiffs in the above entitled action seek to enjoin the defendant, who is District Attorney of Los Angeles County, from enforcing sections 11400 and 11401 of the California Penal Code, otherwise known as the Criminal Syndicalism Act, on the ground that such statute is unconstitutional as being violative of the First and Fourteenth Amendments to the United States Constitution.

2. The chief judge of this circuit has designated Circuit Judge Gilbert H. Jertberg and District Judges William P. Gray and Warren J. Ferguson as a three-judge court to hear and determine the action.

3. Such hearing is now ordered to take place at 10:00 a.m. on Friday, October 27, 1967, in the court room of Judge Gray in the United States Courthouse, Los Angeles.

4. The Clerk is directed to mail copies of this notice and order to each of the individuals to whom it is addressed, the copies to Governor Reagan and Attorney General Lynch to be sent by registered mail or certified mail, as required by statute.

Dated: August 16, 1967

/s/ William P. Gray
Judge, United States District Court

(Certificate of Service omitted in printing)

United States District Court
Central District of California

Civil No. 67-1041-WPG

John Harris, Jr., Jim Dan, Diane Hirsch
and Farrel Broslawsky, Plaintiffs,
vs.
Evelle J. Younger, Defendant.

PRELIMINARY INJUNCTION

This action was argued before and submitted to this three judge court on October 27, 1967, on the motion of the plaintiffs for a preliminary injunction. In support of such motion, the plaintiffs contended that sections 11400 and 11401 of the Penal Code of the State of California are unconstitutional on their face and that the defendant should therefore be enjoined from prosecuting criminal actions against the plaintiffs on the basis of alleged violations of such statute. This court has taken the matter under submission and has prepared, and files contemporaneously herewith, an opinion to the effect that the court has jurisdiction of the parties hereto and of the subject matter; that the hereinabove mentioned statute is unconstitutional on its face; and that the

plaintiffs therefore are entitled to a preliminary injunction. Accordingly,

It Is Ordered, Adjudged and Decreed, pending final determination of this action, that defendant Evelle J. Younger, the District Attorney of Los Angeles County, and all individuals acting under his direction and authority, be and they hereby are enjoined and restrained from further prosecution of the currently pending criminal action against plaintiff John Harris, Jr., for alleged violation of section 11400 and/or 11401 of the Penal Code of the State of California.

Dated: March 11, 1968

Gilbert H. Jertberg,
Circuit Judge

William P. Gray,
District Judge

Warren J. Ferguson,
District Judge

By /s/ William P. Gray
Judge, United States District Court

(Certificate of Service omitted in printing)

**Opinion of the United States District Court for the
Central District of California**

United States District Court, Central District of California.

John Harris, Jr., Jim Dan, Diane Hirsch and Farrel Broslawsky, Plaintiffs, v. Evelle J. Younger, Defendant, Civil Action No. 67-1041-WPG.

Filed Mar. 11, 1968.

Before JERTBERG, Circuit Judge, and GRAY and FERGUSON, District Judges.

GRAY, District Judge.

The plaintiffs in this action challenge California's Criminal Syndicalism Act (the Act), which was first adopted by the legislature in 1919 and constitutes sections 11400-11402 of the Penal Code of that state.*

*§ 11400. *Definition*

"'Criminal syndicalism' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change"

"§ 11401. *Offense; punishment*

"Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written

It is urged in the complaint that the Act is unconstitutional on its face as being in violation of the First and Fourteenth Amendments of the United States Constitution, and this three judge court is asked to enjoin its enforcement.

As the previously indicated footnote discloses, section 11400 defines criminal syndicalism as meaning "... any doctrine . . . teaching or aiding and abetting the commission of crime . . . or unlawful acts of force and violence or . . . terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Section 11401 provides that any person who teaches or aids or publicizes or justifies or commits any act of criminal syndicalism is guilty of a felony. The specific provisions of the five subdivisions of section 11401 will be discussed later in this opinion.

or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

"§ 11402. Partial invalidity"

"If for any reason any section, clause or provision of this article shall by any court be held unconstitutional, the Legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this State all other sections, clauses and provisions of this article."

According to the complaint, plaintiff Harris has been indicted for having distributed certain leaflets in violation of the Act, and his prosecution is pending in the Los Angeles County Superior Court. Plaintiffs Dan and Hirsch allege that they are members of the Progressive Labor Party, which advocates change in industrial ownership and political change, and that they feel inhibited in advocating the program of their political party through peaceful, non-violent means, because of the presence of the Act "on the books", and because of the pending criminal prosecution against Harris. Plaintiff Broslawsky is a history instructor, and he alleges that he is uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works may subject him to prosecution for violation of the Act.

It is the contention of the plaintiffs that the pending prosecution and the prospect of future enforcement of the Act constitute their being subjected to deprivation of constitutional rights under color of that statute, within the meaning of 42 U.S.C. § 1983.

The respondent, who is the District Attorney of Los Angeles County, acknowledges that the prosecution of plaintiff Harris is pending; but he denies that the Act is unconstitutional on its face, or at all, and he therefore moves that the plaintiffs' petition for injunction be dismissed.

This case inherently involves the question of whether the Act does unconstitutionally abridge free expres-

sion or tend to discourage activities in which a person should be free to engage. Under such circumstances, it becomes the duty of this court to undertake to resolve these questions. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed 2d 22 (1965).

We think that it would be preferable for the California courts to have the first opportunity to consider how the challenged statute squares with the First and Fourteenth Amendments. Those courts are just as able to perform this task as are we, and they regularly have shown full alertness to accept and be governed by the constitutional interpretations that are enunciated by the Supreme Court. An excellent example of this is the recent decision of the California Supreme Court in *Vogel v. County of Los Angeles*, 68 A.C. 12, 64 Cal. Reptr. 409, 434 P.2d 961 (1967), which has particular relevance to the issue here at hand.

However, it appears from the pleadings that plaintiff Harris sought unsuccessfully in the California Superior Court a dismissal of the indictment against him on the ground of the unconstitutionality of the Act. He then petitioned for writs of prohibition in the California Court of Appeal and the California Supreme Court to prevent the trial of the pending criminal action; such petitions were denied without opinion and without hearing, respectively. Certainly, it cannot be said that the plaintiffs ignored the state courts in seeking to assert their constitutional claims, although they presumably would have had a right to do so and come directly here. *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967).

Of course, the unconstitutionality of the Act might be challenged as a defense by Harris at his trial, and on appeal if conviction ensues. And it has been held that, under normal circumstances, a federal court should not interfere with state criminal proceedings, even though constitutional issues may be involved therein, inasmuch as such questions may be reviewed by the United States Supreme Court on appeal. *Douglas v. Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). Cf. *Beal v. Missouri Pac. R. Co.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577 (1941).

However, in recent years, exceptions to this rule have been applied when the criminal statute inherently has a limiting effect upon free expression and when, as here, it is susceptible to unduly broad application. Thus in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965), the Supreme Court reversed the decision of a three judge court that it should abstain from entertaining an action to enjoin certain state criminal prosecutions. In the course of the opinion of the Court, Mr. Justice Brennan stated:

“A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v. California*, 361 US 147, 4 L ed 2d 205, 80 S Ct 215. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a

criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt*, *supra*, 377 US at 379, 12 L Ed 2d at 389. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' *NAACP v. Button*, 371 US 415, 433, 9 L Ed 2d 405, 418, 83 S Ct 328. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." (380 U.S. at 486.)

The opinion then went on to state the rule that "We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." (380 U.S. at 489-490.)

The same rule is reasserted in *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967). The opinion of the Court, by Mr. Justice Brennan, observed that when a plaintiff has filed a federal action claiming relief under the First Amendment, to require him ". . . to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." (389 U.S. at 252.)

It follows that in the present case we may not abstain if the challenged statute unconstitutionally abridges free expression. We believe that it does, and

our reasons are set forth in the balance of this opinion.

We are confronted at the outset with the facts that in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), the Act was specifically upheld as not being repugnant to the First and Fourteenth Amendments, and that *Whitney* never has been specifically overruled. It is the respondent's principal contention that we therefore are bound by that decision.

Certainly, we are obliged to follow a square holding by the Supreme Court, so long as it appears to constitute an expression of the Court's current interpretation of the law. But a decision may be overruled simply by being bypassed and ignored, as well as by being denounced specifically, and we are mindful that, under the leadership of the Supreme Court, constitutional concepts of freedom of expression have been refined and broadened a great deal since 1927, when *Whitney* was decided. We therefore have found it necessary to consider how the provisions of the Act and the opinion in *Whitney* square with the more recent holdings by the Supreme Court and expressions from its opinions. The results of our study convince us that neither the Act nor *Whitney* survives this test.

The opinion in *Whitney* ruled that the Act was not unduly vague and uncertain as to its application. In arriving at such conclusion, the Court, speaking through Mr. Justice Sanford, tested the provisions of the Act by comparing them with other statutes that involved economic regulation, and which had

survived constitutional attack. However, since *Whitney* we have learned that statutes seeking to regulate in the area of the First Amendment are held to a more stringent standard of clarity and precision than is required of statutes that undertake to lay down rules for the market place. See *Ware v. Nichols*, 266 F. Supp. 564, 568 (N.D. Miss. 1967). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed. 2d 405, 418 (1963).

The reason for this rule was clearly expressed in *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964). The Court there was concerned with a statutory requirement that obliged teachers employed by the state to swear, in effect, that they were not in violation of a statute whose provisions had substantially identical counterparts in the Act here involved. The Court held the statutory provisions invalid on their face as being unconstitutionally vague, and, in the course of the opinion, Mr. Justice White stated:

"Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." (377 U.S. at 372-73.)

This statement must apply at least as strongly with respect to people who desire to remain carefully within the law and therefore keep their comments and

activities within safe bounds in order to avoid all risk or threat of prosecution. First Amendment freedoms ". . . are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed. 2d 405, 418 (1963).

Therefore, despite *Whitney*, we must consider again whether the Act is impermissibly vague and overbroad. In undertaking this task, we are obliged to be mindful of another recently established principle. Under normal circumstances, a court should not consider a constitutional attack upon a statute on any basis that goes beyond the impending or probable application of such statute to the challenger. *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed. 2d 524 (1960). However, ". . . the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application", to which the Court adverted in *Button* (371 U.S. at 433), has brought about an exception to that rule. When such a statute is involved, we are obliged to consider it as a whole, irrespective of its limited applicability to the parties challenging it, and irrespective of whether a statute may be drawn with the requisite narrow specificity that would apply to them. This rule is clearly stated in *Dombrowski v. Pfister*, and the following reasons given therefor:

"If the rule were otherwise, the contours of regulation would have to be hammered out case by

case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. *Ex parte Young*, *supra*, 209 US at 147-148, 52 L ed at 723, 724. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed. 2d 22, 29 (1965).)

Bearing in mind these principles, we now examine the things that are proscribed by section 11401 of the Act by making their commission a felony.

Sub-section 1 would include within its condemnation "Any person who . . . advocates, teaches or aids and abets criminal syndicalism or the . . . propensity of committing . . . violence . . . as a means of . . . effecting any political change."

In the first place, inasmuch as *advocacy* of criminal syndicalism is separately prohibited, it would appear that a person who teaches *about* criminal syndicalism without advocating it may be included within the Act. A person lecturing on the Communist Manifesto or our own Revolutionary War would be teaching about violence as a means of effecting

political change. It may be presumed that the legislature did not intend to make such conduct a crime; but where is the line to be drawn? This very uncertainty in the use of the words "advocate" and "teach" was noted by the Supreme Court as a reason for declaring unconstitutional the statute involved in *Keyishian v. Board of Regents*, 385 U.S. 589, 600, 87 S.Ct. 675, 682, 17 L.Ed. 2d 629, 639 (1967).

"... where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained." See *Herndon v. Lowry*, 301 U.S. 242, 259, 57 S.Ct. 732, 739, 81 L.Ed. 1066, 1075 (1937).

Even if the Act were to be construed as including only the type of teaching that involves advocacy, it still is overbroad in its prohibition, because the advocacy condemned is not limited to the "Action now!!" variety.

"[E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind." See *Whitney v. California*, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 72 L.Ed. 1095, 1106 (1927), concurring opinion by Mr. Justice Brandeis.

Again, in *Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 1521, 6 L.Ed. 2d 836, 841 (1961), we are instructed that:

"... the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching,"

See also *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356, 1371-72 (1957). The doctrine here attributed to *Noto* and *Yates* was asserted by Mr. Justice Harlan in those opinions as a reason for reversing convictions under Smith Act (18 U.S.C. § 2385), which provides for punishment of one who "... knowingly or willfully advocates . . . or teaches the . . . propriety . . ." of violent overthrow of government. We are mindful that the Court there was content to interpret those provisions as being limited to incitement and did not question their constitutionality; and we are mindful also that the Smith Act was upheld in *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). However, we believe that we are bound by the later case of *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967), which held unconstitutional on its face, as being fatally vague, a statute

that made ineligible for employment as a teacher a person who ". . . wilfully and deliberately advocates . . . or teaches the doctrine . . ." of violent overthrow. One of the bases of the decision was that "The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine" (385 U.S. at 599.)

To *abet* criminal syndicalism is also made a crime by sub-section 1. What constitutes such abetting? Presumably, it might include assisting in the conduct of a meeting called under the auspices of an organization advocating criminal syndicalism, irrespective of the purpose of the meeting. But a prosecution for just such an offense was reversed as an unconstitutional curtailment of free speech and assembly in *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 298 (1937), in an opinion written by Mr. Chief Justice Hughes.

Abetting would necessarily include lending "aid" or "support" or "advice" or "counsel" or "influence" in furtherance of criminal syndicalism. These very words in an oath requirement statute were held, in *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285 (1961), to require application of the principle that

" . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at

its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926).

Sub-section 1 clearly fails to meet the standards of constitutionality disclosed by the foregoing authorities.

Sub-section 2 would punish anyone who "Wilfully and deliberately . . . attempts to justify criminal syndicalism. . . ." The conduct here prohibited would cover mere expression of belief or philosophy. It does not even reach the general level of potential danger occupied by abstract advocacy of violent overthrow. The assertion of doctrinal justification of criminal syndicalism, or of any other doctrine, however repulsive or unpatriotic, falls clearly within the protection of the First and Fourteenth Amendments, and such conduct may not be proscribed by statute. Cf. *Noto v. United States*, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed. 2d 836 (1961). This conclusion is also required by all of the other authorities cited in our discussion with respect to sub-section 1 of the Act.

Sub-section 3 of the Act condemns as a violator a person who "Prints, publishes . . . circulates or publicly displays any . . . paper . . . containing . . . teaching . . . of . . . criminal syndicalism." In our discussion of sub-section 1, we have pointed out how it is that a statute that seeks to punish one who *teaches* criminal syndicalism is rendered void by the First Amendment. If the *teacher* cannot be punished, it follows that the person that prints the paper con-

taining the writings of the teacher, the magazine editor that publishes it, the sidewalk vendor that sells it, and the librarian that publicly displays it—all are similarly protected by the Constitution. And yet, it is hard to see how the Act could be interpreted without making all of such people subject to prosecution.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278, 284 (1937).

Sub-section 3 completely overlooks this principle. Cf. *Keyishian v. Board of Regents*, 385 U.S. 589, 601, 87 S.Ct. 675, 682-83, 17 L.Ed. 2d 629, 639 (1967).

Sub-section 4 would make it unlawful to assist in organizing or knowingly be a member of any organization formed to teach or abet criminal syndicalism. Here, the envisaged danger to the public is even farther removed than that with which sub-section 1 attempted to deal. For while the latter-mentioned provision of the Act would prosecute a person who *already* has preached criminal syndicalism, sub-section 4 makes it a crime for a person to associate in an organization with others who *propose* to preach it.

See *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095, 1104-05 (1927), concurring opinion of Mr. Justice Brandeis.

Sub-section 4 violates yet another constitutional principle. It does not require, as a condition precedent to prosecution, that the member of the suspect organization is, himself, devoted to the unlawful aims of the organization and desirous of fulfilling them. It would permit prosecution on the basis of membership alone.

"[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organizational notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman v. United States*, 320 U.S. 118, 136, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, 1808 (1943).

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967), was concerned with a statute that barred employment of members of listed organizations. The statute, whose terms were substantially identical to sub-section 4 of the Act here concerned, was declared invalid on its face. The opinion contained the following, which is closely applicable here:

"Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants." (385 U.S. at 606.)

A statute similar to that involved in *Keyishian* was invalidated in *Elfbrandt v. Russell*, 384 U.S. 11, 86 S.

Ct. 1238, 16 L.Ed. 2d 321 (1966). In writing for the Court, Mr. Justice Douglas said: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." (384 U.S. at 19.)

The Subversive Activities Control Act of 1950, 50 U.S.C. § 784(a)(1)(D), provides that no member of a Communist-action organization may lawfully "engage in any employment in any defense facility." The Supreme Court, in the very recent case of *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967), held the statute unconstitutional on its face, as a violation of the First Amendment, because it did not limit its application to those members who had specific intent to further the unlawful goals of the organization concerned.

In *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964), the Court held overbroad, and thus unconstitutional on its face, a statute that deprived members of Communist organizations of the right to travel abroad, irrespective of any showing that they were devoted to the organizations' unlawful objectives.

If mere knowing membership in an organization may not form the basis for loss of employment or for restrictions upon foreign travel, it necessarily follows that such membership may not constitutionally constitute a felony.

Sub-section 5 makes subject to criminal prosecution any person who "Wilfully . . . practices or commits any act . . . taught or aided and abetted by the doctrine . . . of criminal syndicalism, with intent to accomplish . . . any political change." This is the most vague, uncertain and overbroad provision of all. Criminal syndicalism is defined, in section 11400 of the Act, as a doctrine ". . . advocating, teaching or aiding and abetting . . ." unlawful acts of force looking toward violent overthrow. Do acts taught by the doctrine, and thus condemned by sub-section 5, include the acts of teaching and advocating and abetting violent overthrow? If so, such acts are already condemned by sub-section 1, and the prohibition of such acts violates the First and Fourteenth Amendments for the reasons previously discussed in this opinion.

Assuming that the "acts" envisaged by sub-section 5 go beyond teaching and doctrinal advocacy, what conduct would be included? Would casting a vote for a Communist in a political election be conduct ". . . taught or aided and abetted by the doctrine . . ."? Would a person who rents a hall to an organization dedicated to criminal syndicalism, or who prints a placard for use in one of its parades, risk prosecution under the Act? Beyond doubt, some of the activities that sub-section 5 seeks to reach involve conduct amounting to force or violence or incitement that properly may be punished, and which conceivably may not be covered by other criminal statutes. However, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal stat-

utes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 396 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939). Sub-section 5 completely fails in this respect, and it is not a court's function to cut down the scope of an overbroad law operating in the field of the First Amendment and refine it to constitutional proportions. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965).

In light of all of the foregoing, we are convinced that we are no longer bound by *Whitney v. California*,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), and that application of present and more enlightened concepts of the meaning of the First Amendment requires the holding that the Act is unconstitutional on its face. We so declare. Cf. *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967).

In arriving at this decision, we wish to emphasize that we are fully sympathetic with the right and obligation of a state to protect itself, but we are authoritatively and properly reminded that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v.*

*Cf. *Barnette v. Board of Education*, 47 F. Supp. 251 (S.D. W.Va. 1942), in which a three judge court declared unconstitutional a compulsory flag salute law even though the same type of statute had been upheld by the Supreme Court two years before in *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940). The decision was affirmed on appeal a year later in an opinion that specifically overruled *Gobitis*. *Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231, 237 (1960). A similar and equally pertinent expression is found in the opinion by Mr. Chief Justice Warren, speaking for the Court in *United States v. Robel*, 389 U.S. 258, 267-68, 88 S.Ct. 419, 425-26, 19 L.Ed. 2d 508, 516-17 (1967):

"Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. [Citing cases.] The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less."

We should like also to make clear that our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky stand in any danger of prosecution by the respondent, the present District Attorney of Los Angeles County, because of the activities that they ascribed to themselves in the complaint, as mentioned at the outset of this opinion. Nor do we imply the existence of a likelihood that the courts of California would entertain such prosecutions if instituted. However, "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S.Ct. 1316, 1323, 12 L.Ed. 2d 377, 386 (1964).

The defendant's motion to dismiss the complaint is denied.

We believe that our declaration that the Act is unconstitutional on its face is all of the relief that is necessary to be accorded the plaintiffs at this time, inasmuch as we are confident that while this decision stands the defendant would adhere to it and would refrain from further prosecutions under the Act. However, we have some concern that for us to withhold injunctive relief may deprive the defendant of the right to appeal to the Supreme Court otherwise accorded him by 28 U.S.C. § 1253. Accordingly, by separate order, a temporary injunction will be issued by this court which will enjoin the defendant from further prosecution of the currently pending action against plaintiff Harris for alleged violation of the Act.

Judges Jertberg and Ferguson concur.

Dated: March 1, 1968.

William P. Gray
United States District Judge

United States District Court
Central District of California

Civil No. 67-1041-WPG

(Title Omitted in Printing)

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

I. Notice is hereby given that Evelle J. Younger, the defendant above named, hereby appeals to the Supreme Court of the United States from the preliminary injunction entered in this action on March 11, 1968.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: All pleadings of the parties to the above-entitled action, including but not limited to plaintiffs' complaint for injunction, defendant's motion to dismiss, all memoranda of the parties in support of and in opposition to plaintiffs' prayer for injunctive relief, a transcript of the argument of the parties made before the three-judge panel heard October 27, 1967, a copy of the preliminary injunction dated March 11, 1968, a copy of the opinion of the three-judge panel in the above-entitled matter

dated March 11, 1968, verbatim copies of the Sections 11400, 11401, and 11402 of the California Penal Code.

III. The following questions are presented by this appeal:

1. Whether a decision of the United States Supreme Court holding a state criminal statute constitutional is binding on all inferior courts, both state and federal;
2. Whether California's Syndicalism Act, Sections 11400-11402 of the California Penal Code is unconstitutional on its face.

(Jurat and Affidavit of Service omitted in printing)

Supreme Court of the United States

No. 163 ----, October Term, 19 68

Evelle J. Younger,
Appellant,

v.

John Harris, Jr., et al.

APPEAL from the United States District Court
for the Central District of California.

The statement of jurisdiction in this case
having been submitted and considered by the Court,
probable jurisdiction is noted and the case is placed
on the summary calendar.

January 13, 1969

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Supreme Court of the United States F. DAVIS, CLERK

October Term, 1967 #2

No. [REDACTED] [REDACTED] #2

JOHN HARRIS, JR., JIM DAN, DIANE HIRSCH, and
FARREL BROSLAWSKY,

Plaintiffs and Appellees,

vs.

EVELLE J. YOUNGER,

Defendant and Appellant.

JURISDICTIONAL STATEMENT.

EVELLE J. YOUNGER,
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WILLIAM L. RITZI,
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IN THE
Supreme Court of the United States

October Term, 1967

No.

JOHN HARRIS, JR., JIM DAN, DIANE HIRSCH, and
FARREL BROSLAWSKY,

Plaintiffs and Appellees,

vs.

EVELLE J. YOUNGER,

Defendant and Appellant.

JURISDICTIONAL STATEMENT.

The above entitled matter was decided by a three-judge court sitting in the United States District Court Central District of California, in an opinion entered March 11, 1968, a copy of which is herein appended and which is reported in 281 F. Supp. 507.

Statement of Jurisdiction.

Jurisdiction of the United States Supreme Court is invoked upon the basis of the statutes and authority as set out below.

This proceeding rose out of plaintiffs-appellees' request for injunctive relief under 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), and 42 U.S.C. § 1983. Plaintiffs-appellees allege that the California Criminal Syndicalism Statute §'s 11400-11402 of the Penal Code of California were not constitutional and unenforceable. Act-

ing under 28 U.S.C. § 2284, a three-judge panel was convened. The matter was heard, and judgment was entered by said three-judge court on March 11, 1968. Together with its judgment, the court granted injunctive relief staying defendant-appellant from prosecuting the matter of the *People of the State of California v. John Harris, Jr.*, Cal. Super. Ct. No. 328981. The appellant filed a notice of appeal on April 9, 1968, in United States District Court, Central District of California.

Appellant hereby appeals pursuant to 28 U.S.C. § 1253 citing *Radio Corporation of America v. United States*, 341 U.S. 42, 95 L. Ed. 1062.

Statute to Be Considered.

“§ 11400. [Definition.] ‘Criminal syndicalism’ as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change. [Added by Stats. 1953, ch. 32, § 19.]”

* * *

“§ 11401. [Unlawful acts: Penalty.] Any person who:

“1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any un-

lawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

“2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

“3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

“4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

“5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership, or control, or effecting any political change;

“Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years. [Added by Stats. 1953, ch 32, § 19.]”

* * *

“§ 11402. [Invalidity of part of article not to affect remainder.] If for any reason any section, clause or provision of this article shall by any court be held unconstitutional, the Legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this State all other sections, clauses and provisions of this article. [Added by Stats. 1953, ch. 32, § 19.]”

Questions on Appeal.

The questions presented by this appeal are:

1. Whether the decision of the United States Supreme Court holding a state criminal statute constitutional is binding on all Inferior Courts, both State and Federal.
2. Whether California's Criminal Syndicalism Act §'s 11400-11402 is unconstitutional on its face.

Statement of Case.

On September 20, 1966, the Los Angeles County Grand Jury returned an indictment charging John Harris, Jr., with two counts of violating § 11401(3) of the California Penal Code. Said acts allegedly occurred on May 25, 1966 and on May 26, 1966. Defendant was arraigned in Los Angeles Superior Court on said indictment and defendant entered a demurrer and a motion under §995 of the California Penal Code. Said motions were heard in Department 105, Los Angeles County Superior Court, December 1, 1966. Defendant's motions were denied. Defendant filed with the California Court of Appeals for a writ of prohibition alleging unconstitutionality of the statute. Said writ was

denied. Defendant thereupon petitioned the California Supreme Court to issue its writ of prohibition based upon the same grounds. Said petition was denied.

The matter was set for trial in Superior Court in and for the County of Los Angeles for March 6, 1967. Several continuances from the first trial setting were requested by defendant and granted.

On July 21, 1967, John Harris, Jr., together with others as named herein, filed in the United States District Court for the Central District of California, a complaint for injunction and request for a three-judge court.

On August 16, 1967, the United States District Court for the Central District of California issued its order designating the three-judge court and set the matter for hearing on October 27, 1967.

The matter was heard and argued October 27, 1967. On March 11, 1968, three-judge court entered its opinion declaring the California Criminal Syndicalism Act §'s 11400-11402, Penal Code of California, unconstitutional on its face. The court also issued an order restraining defendant-appellant from further proceeding in the matter of the *People v. John Harris, Jr.*, L.A. Super. Ct. No. 328981.

Effect of Judgment.

The ruling of the three-judge court and the issuance of its restraining order as to appellant, has the effect of now placing the state matter of *People v. Harris*, L.A. Super. Ct. No. 328981 in a state of limbo, both as to the appellant herein and John Harris, Jr., as defendant in the state matter. The matter cannot be resolved until such time as the Honorable United States

Supreme Court makes a final determination as to the constitutionality of the California Criminal Syndicalism Act. Likewise, what has previously been held to be a constitutional state statute, California Criminal Syndicalism Act, by the United States Supreme Court (*Whitney v. California*, 274 U.S. 357, 71 L. Ed. 1095) cannot now practicably be invoked in any matter until this question has resolved.

Respectfully submitted,

EVELLE J. YOUNGER,
District Attorney,

LYNN D. COMPTON,
Chief Deputy District Attorney,

WILLIAM L. RITZI,
Assistant District Attorney,

PATRICK T. McCORMICK,
Deputy District Attorney,

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Deputy District Attorney,

Attorneys for Defendant and Appellant.

APPENDIX.

Opinion of the United States District Court, Central District of California.

United States District Court, Central District of California.

John Harris, Jr., Jim Dan, Diane Hirsch and Farrell Broslawsky, Plaintiffs, v. Evelle J. Younger, Defendant. Civil Action No. 67-1041-WPG.

Filed Mar. 11, 1968.

Before JERTBERG, Circuit Judge, and GRAY and FERGUSON, District Judges.

GRAY, District Judge.

The plaintiffs in this action challenge California's Criminal Syndicalism Act (the Act), which was first adopted by the legislature in 1919 and constitutes sections 11400-11402 of the Penal Code of that state.*

*§ 11400. *Definition*

"Criminal syndicalism" as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change"

"§ 11401. *Offense; punishment*

"Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or un-

(This footnote is continued on the next page)

It is urged in the complaint that the Act is unconstitutional on its face as being in violation of the First and Fourteenth Amendments of the United States Constitution, and this three judge court is asked to enjoin its enforcement.

As the previously indicated footnote discloses, section 11400 defines criminal syndicalism as meaning ". . . any doctrine . . . teaching or aiding and abetting the commission of crime . . . or unlawful acts of force and violence or . . . terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Section 11401 provides that any person who teaches or aids or publicizes or justifies or commits any act of criminal syndicalism is guilty of a felony. The specified methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

"§ 11402. Partial invalidity"

"If for any reason any section, clause or provision of this article shall by any court be held unconstitutional, the Legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this State all other sections, clauses and provisions of this article."

cific provisions of the five subdivisions of section 11401 will be discussed later in this opinion.

According to the complaint, plaintiff Harris has been indicted for having distributed certain leaflets in violation of the Act, and his prosecution is pending in the Los Angeles County Superior Court. Plaintiffs Dan and Hirsch allege that they are members of the Progressive Labor Party, which advocates change in industrial ownership and political change, and that they feel inhibited in advocating the program of their political party through peaceful, non-violent means, because of the presence of the Act "on the books", and because of the pending criminal prosecution against Harris. Plaintiff Broslawsky is a history instructor, and he alleges that he is uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works may subject him to prosecution for violation of the Act.

It is the contention of the plaintiffs that the pending prosecution and the prospect of future enforcement of the Act constitute their being subjected to deprivation of constitutional rights under color of that statute, within the meaning of 42 U.S.C. § 1983.

The respondent, who is the District Attorney of Los Angeles County, acknowledges that the prosecution of plaintiff Harris is pending; but he denies that the Act is unconstitutional on its face, or at all, and he therefore moves that the plaintiffs' petition for injunction be dismissed.

This case inherently involves the question of whether the Act does unconstitutionally abridge free expression

or tend to discourage activities in which a person should be free to engage. Under such circumstances, it becomes the duty of this court to undertake to resolve these questions. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965).

We think that it would be preferable for the California courts to have the first opportunity to consider how the challenged statute squares with the First and Fourteenth Amendments. Those courts are just as able to perform this task as are we, and they regularly have shown full alertness to accept and be governed by the constitutional interpretations that are enunciated by the Supreme Court. An excellent example of this is the recent decision of the California Supreme Court in *Vogel v. County of Los Angeles*, 68 A.C. 12, 64 Cal. Repr. 409, 434 P.2d 961 (1967), which has particular relevance to the issue here at hand.

However, it appears from the pleadings that plaintiff Harris sought unsuccessfully in the California Superior Court a dismissal of the indictment against him on the ground of the unconstitutionality of the Act. He then petitioned for writs of prohibition in the California Court of Appeal and the California Supreme Court to prevent the trial of the pending criminal action; such petitions were denied without opinion and without hearing, respectively. Certainly, it cannot be said that the plaintiffs ignored the state courts in seeking to assert their constitutional claims, although they presumably would have had a right to do so and come directly here. *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967).

Of course, the unconstitutionality of the Act might be challenged as a defense by Harris at his trial, and

on appeal if conviction ensues. And it has been held that, under normal circumstances, a federal court should not interfere with state criminal proceedings, even though constitutional issues may be involved therein, inasmuch as such questions may be reviewed by the United States Supreme Court on appeal. *Douglas v. Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). Cf. *Bcal v. Missouri Pac. R. Co.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577 (1941).

However, in recent years, exceptions to this rule have been applied when the criminal statute inherently has a limiting effect upon free expression and when, as here, it is susceptible to unduly broad application. Thus in *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965), the Supreme Court reversed the decision of a three judge court that it should abstain from entertaining an action to enjoin certain state criminal prosecutions. In the course of the opinion of the Court, Mr. Justice Brennan stated:

“A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith v California*, 361 US 147, 4 L ed 2d 205, 80 S Ct 215. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v Bullitt*, *supra*, 377 US at

379, 12 L ed 2d at 389. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .' NAACP v Button, 371 US 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." (380 U.S. at 486.)

The opinion then went on to state the rule that "We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." (380 U.S. at 489-490.)

The same rule is reasserted in *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967). The opinion of the Court, by Mr. Justice Brennan, observed that when a plaintiff has filed a federal action claiming relief under the First Amendment, to require him ". . . to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." (389 U.S. at 252.)

It follows that in the present case we may not abstain if the challenged statute unconstitutionally abridges free expression. We believe that it does, and our reasons are set forth in the balance of this opinion.

We are confronted at the outset with the facts that in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), the Act was specifically upheld

as not being repugnant to the First and Fourteenth Amendments, and that *Whitney* never has been specifically overruled. It is the respondent's principal contention that we therefore are bound by that decision.

Certainly, we are obliged to follow a square holding by the Supreme Court, so long as it appears to constitute an expression of the Court's current interpretation of the law. But a decision may be overruled simply by being bypassed and ignored, as well as by being denounced specifically, and we are mindful that, under the leadership of the Supreme Court, constitutional concepts of freedom of expression have been refined and broadened a great deal since 1927, when *Whitney* was decided. We therefore have found it necessary to consider how the provisions of the Act and the opinion in *Whitney* square with the more recent holdings by the Supreme Court and expressions from its opinions. The results of our study convince us that neither the Act nor *Whitney* survives this test.

The opinion in *Whitney* ruled that the Act was not unduly vague and uncertain as to its application. In arriving at such conclusion, the Court, speaking through Mr. Justice Sanford, tested the provisions of the Act by comparing them with other statutes that involved economic regulation, and which had survived constitutional attack. However, since *Whitney* we have learned that statutes seeking to regulate in the area of the First Amendment are held to a more stringent standard of clarity and precision than is required of statutes that undertake to lay down rules for the market place. See *Ware v. Nichols*, 266 F. Supp. 564, 568 (N.D. Miss. 1967). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*,

371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed. 2d 405, 418 (1963).

The reason for this rule was clearly expressed in *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964). The Court there was concerned with a statutory requirement that obliged teachers employed by the state to swear, in effect, that they were not in violation of a statute whose provisions had substantially identical counterparts in the Act here involved. The Court held the statutory provisions invalid on their face as being unconstitutionally vague, and, in the course of the opinion, Mr. Justice White stated:

"Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." (377 U.S. at 372-73.)

This statement must apply at least as strongly with respect to people who desire to remain carefully within the law and therefore keep their comments and activities within safe bounds in order to avoid all risk or threat of prosecution. First Amendment freedoms "... are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed. 2d 405, 418 (1963).

Therefore, despite *Whitney*, we must consider again whether the Act is impermissibly vague and overbroad. In undertaking this task, we are obliged to be mindful of another recently established principle. Under nor-

mal circumstances, a court should not consider a constitutional attack upon a statute on any basis that goes beyond the impending or probable application of such statute to the challenger. *United States v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed. 2d 524 (1960). However, ". . . the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application", to which the Court adverted in *Button* (371 U.S. at 433), has brought about an exception to that rule. When such a statute is involved, we are obliged to consider it as a whole, irrespective of its limited applicability to the parties challenging it, and irrespective of whether a statute may be drawn with the requisite narrow specificity that would apply to them. This rule is clearly stated in *Dombrowski v. Pfister*, and the following reasons given therefor:

"If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. *Ex parte Young*, supra, 209 US at 147-148, 52 L.ed at 723, 724. By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed. 2d 22, 29 (1965)).

Bearing in mind these principles, we now examine the things that are proscribed by section 11401 of the Act by making their commission a felony.

Sub-section 1 would include within its condemnation "Any person who . . . advocates, teaches or aids and abets criminal syndicalism or the . . . propriety of committing . . . violence . . . as a means of . . . effecting any political change."

In the first place, inasmuch as *advocacy* of criminal syndicalism is separately prohibited, it would appear that a person who teaches *about* criminal syndicalism without advocating it may be included within the Act. A person lecturing on the Communist Manifesto or our own Revolutionary War would be teaching about violence as a means of effecting political change. It may be presumed that the legislature did not intend to make such conduct a crime; but where is the line to be drawn? This very uncertainty in the use of the words "advocate" and "teach" was noted by the Supreme Court as a reason for declaring unconstitutional the statute involved in *Keyishian v. Board of Regents*, 385 U.S. 589, 600, 87 S.Ct. 675, 682, 17 L.Ed. 2d 629, 639 (1967).

". . . where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained." See *Herndon v. Lowery*, 301 U.S. 242, 259, 57 S.Ct. 732, 739, 81 L.Ed. 1066, 1075 (1937).

Even if the Act were to be construed as including only the type of teaching that involves advocacy, it still

is overbroad in its prohibition, because the advocacy condemned is not limited to the "Action now!!" variety.

"[E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind." See *Whitney v. California*, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 72 L.Ed. 1095, 1106 (1927), concurring opinion by Mr. Justice Brandeis.

Again, in *Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 1521, 6 L.Ed. 2d 836, 841 (1961), we are instructed that:

" . . . the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching,"

See also *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed. 2d 1356, 1371-72 (1957). The doctrine here attributed to *Noto* and *Yates* was asserted by Mr. Justice Harlan in those opinions as a reason for reversing convictions under Smith Act (18

U.S.C. § 2385), which provides for punishment of one who ". . . knowingly or willfully advocates . . . or teaches the . . . propriety . . ." of violent overthrow of government. We are mindful that the Court there was content to interpret those provisions as being limited to incitement and did not question their constitutionality; and we are mindful also that the Smith Act was upheld in *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). However, we believe that we are bound by the later case of *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967), which held unconstitutional on its face, as being fatally vague, a statute that made ineligible for employment as a teacher a person who ". . . wilfully and deliberately advocates . . . or teaches the doctrine . . ." of violent overthrow. One of the bases of the decision was that "The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine." (385 U.S. at 599.)

To *abet* criminal syndicalism is also made a crime by sub-section 1. What constitutes such abetting? Presumably, it might include assisting in the conduct of a meeting called under the auspices of an organization advocating criminal syndicalism, irrespective of the purpose of the meeting. But a prosecution for just such an offense was reversed as an unconstitutional curtailment of free speech and assembly in *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 298 (1937), in an opinion written by Mr. Chief Justice Hughes.

Abetting would necessarily include lending "aid" or "support" or "advice" or "counsel" or "influence" in furtherance of criminal syndicalism. These very words in an oath requirement statute were held, in *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285 (1961), to require application of the principle that

"... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926).

Sub-section 1 clearly fails to meet the standards of constitutionality disclosed by the foregoing authorities.

Sub-section 2 would punish anyone who "Wilfully and deliberately . . . attempts to justify criminal syndicalism. . . ." The conduct here prohibited would cover mere expression of belief or philosophy. It does not even reach the general level of potential danger occupied by abstract advocacy of violent overthrow. The assertion of doctrinal justification of criminal syndicalism, or of any other doctrine, however repulsive or unpatriotic, falls clearly within the protection of the First and Fourteenth Amendments, and such conduct may not be proscribed by statute. Cf. *Noto v. United States*, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed. 2d 836 (1961). This conclusion is also required by all of the other authorities cited in our discussion with respect to sub-section 1 of the Act.

Sub-section 3 of the Act condemns as a violator a person who "Prints, publishes . . . circulates or publicly displays any . . . paper . . . containing . . . teaching . . .

of . . . criminal syndicalism." In our discussion of sub-section 1, we have pointed out how it is that a statute that seeks to punish one who *teaches* criminal syndicalism is rendered void by the First Amendment. If the *teacher* cannot be punished, it follows that the person that prints the paper containing the writings of the teacher, the magazine editor that publishes it, the sidewalk vendor that sells it, and the librarian that publicly displays it—all are similarly protected by the Constitution. And yet, it is hard to see how the Act could be interpreted without making all of such people subject to prosecution.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278, 284 (1937).

Sub-section 3 completely overlooks this principle. Cf. *Keyishian v. Board of Regents*, 385 U.S. 589, 601, 87 S.Ct. 675, 682-83, 17 L.Ed. 2d 629, 639 (1967).

Sub-section 4 would make it unlawful to assist in organizing or knowingly be a member of any organization formed to teach or abet criminal syndicalism. Here, the envisaged danger to the public is even farther removed than that with which sub-section 1 attempted to

deal. For while the latter-mentioned provision of the Act would prosecute a person who *already* has preached criminal syndicalism, sub-section 4 makes it a crime for a person to associate in an organization with others who *propose* to preach it. See *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095, 1104-05 (1927), concurring opinion of Mr. Justice Brandeis.

Sub-section 4 violates yet another constitutional principle. It does not require, as a condition precedent to prosecution, that the member of the suspect organization is, himself, devoted to the unlawful aims of the organization and desirous of fulfilling them. It would permit prosecution on the basis of membership alone.

"[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organizational notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Schneiderman v. United States*, 320 U.S. 118, 136, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, 1808 (1943).

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967), was concerned with a statute that barred employment of members of listed organizations. The statute, whose terms were substantially identical to sub-section 4 of the Act here concerned, was declared invalid on its face. The opinion contained the following, which is closely applicable here:

"Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants." (385 U.S. at 606.)

A statute similar to that involved in *Keyishian* was invalidated in *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L.Ed. 2d 321 (1966). In writing for the Court, Mr. Justice Douglas said: "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." (384 U.S. at 19.)

The Subversive Activities Control Act of 1950, 50 U.S.C. § 784(a)(1)(D), provides that no member of a Communist-action organization may lawfully "engage in any employment in any defense facility." The Supreme Court, in the very recent case of *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967), held the statute unconstitutional on its face, as a violation of the First Amendment, because it did not limit its application to those members who had specific intent to further the unlawful goals of the organization concerned.

In *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed. 2d 992 (1964), the Court held overboard, and thus unconstitutional on its face, a statute that deprived members of Communist organizations of the right to travel abroad, irrespective of any showing that they were devoted to the organizations' unlawful objectives.

If mere knowing membership in an organization may not form the basis for loss of employment or for restrictions upon foreign travel, it necessarily follows that such membership may not constitutionally constitute a felony.

Sub-section 5 makes subject to criminal prosecution any person who "Wilfully . . . practices or commits any act . . . taught or aided and abetted by the doctrine . . . of criminal syndicalism, with intent to accomplish . . . any political change." This is the most vague, uncertain and overbroad provision of all. Criminal syndicalism is defined, in section 11400 of the Act, as a doctrine ". . . advocating, teaching or aiding and abetting . . ." unlawful acts of force looking toward violent overthrow. Do acts taught by the doctrine, and thus condemned by sub-section 5, include the acts of teaching and advocating and abetting violent overthrow? If so, such acts are already condemned by sub-section 1, and the prohibition of such acts violates the First and Fourteenth Amendments for the reasons previously discussed in this opinion.

Assuming that the "acts" envisaged by sub-section 5 go beyond teaching and doctrinal advocacy, what conduct would be included? Would casting a vote for a Communist in a political election be conduct ". . . taught or aided and abetted by the doctrine . . ."? Would a person who rents a hall to an organization dedicated to criminal syndicalism, or who prints a placard for use in one of its parades, risk prosecution under the Act? Beyond doubt, some of the activities that sub-section 5 seeks to reach involve conduct amounting to force or violence or incitement that properly may be punished, and which conceivably may not be covered by other criminal statutes. However, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids," *Lanzetta v. New Jersey*, 396 U.S. 451, 453, 59 S.Ct.

618, 619, 83 L.Ed. 888, 890 (1939). Sub-section 5 completely fails in this respect, and it is not a court's function to cut down the scope of an overbroad law operating in the field of the First Amendment and refine it to constitutional proportions. *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965).

In light of all of the foregoing, we are convinced that we are no longer bound by *Whitney v. California*,* 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), and that application of present and more enlightened concepts of the meaning of the First Amendment requires the holding that the Act is unconstitutional on its face. We so declare. Cf. *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967).

In arriving at this decision, we wish to emphasize that we are fully sympathetic with the right and obligation of a state to protect itself, but we are authoritatively and properly reminded that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231, 237 (1960). A similar and equally pertinent expression is found in the opinion by Mr. Chief Justice Warren.

*Cf. *Barnette v. Board of Education*, 47 F. Supp. 251 (S.D. W.Va. 1942), in which a three judge court declared unconstitutional a compulsory flag salute law even though the same type of statute had been upheld by the Supreme Court two years before in *Minersville School District v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940). The decision was affirmed on appeal a year later in an opinion that specifically overruled *Gobitis*. *Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

speaking for the Court in *United States v. Robel*, 389 U.S. 258, 267-68, 88 S.Ct. 419, 425-26, 19 L.Ed. 2d 508, 516-17 (1967):

"Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute when imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. [Citing cases.] The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less."

We should like also to make clear that our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky stand in any danger of prosecution by the respondent, the present District Attorney of Los Angeles County, because of the activities that they ascribed to themselves in the complaint, as mentioned at the outset of this opinion. Nor do we imply the existence of a likelihood that the courts of California would entertain such prosecutions if instituted. However, "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt*, 377 U.S. 360, 373, 84 S. Ct. 1316, 1323, 12 L.Ed. 2d 377, 386 (1964).

The defendant's motion to dismiss the complaint is denied.

We believe that our declaration that the Act is unconstitutional on its face is all of the relief that is necessary to be accorded the plaintiffs at this time, inasmuch as we are confident that while this decision stands the

defendant would adhere to it and would refrain from further prosecutions under the Act. However, we have some concern that for us to withhold injunctive relief may deprive the defendant of the right to appeal to the Supreme Court otherwise accorded him by 28 U.S.C. § 1253. Accordingly, by separate order, a temporary injunction will be issued by this court which will enjoin the defendant from further prosecution of the currently pending action against plaintiff Harris for alleged violation of the Act.

Judges Jertberg and Ferguson concur.

Dated: March 1, 1968.

William P. Gray
United States District Judge

No. 2

Motion to affirm filed
July 17, 1968 (not printed)

FILE COPY

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1968

No. ~~***~~ 2

EVELLE J. YOUNGER,
Defendant and Appellant,
vs.
JOHN HARRIS, JR., et al.,
Plaintiffs and Appellees.

On Appeal from the United States District Court
Central District of California

**BRIEF FOR THE PEOPLE OF THE
STATE OF CALIFORNIA**

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FILED

Oct
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JOHN F. DAVIS, CLERK

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In the Supreme Court
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OCTOBER TERM, 1968

No. 163

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vs.
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Plaintiffs and Appellees.

On Appeal from the United States District Court
Central District of California

BRIEF FOR THE PEOPLE OF THE
STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

Appellant Evelle J. Younger, District Attorney of Los Angeles County, appeals from the judgment of a three-judge panel of the United States District Court for the Central District of California, entered on March 11, 1968, declaring unconstitutional on its face California's Criminal Syndicalism Act, and enjoining appellant from further prosecution of the pending

action against appellee Harris for alleged violation of the Act. At the instance of this Court, Thomas C. Lynch, Attorney General of California, on behalf of the People of the State of California submits this statement to show appellate jurisdiction in this Court and to show that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Central District of California is reported in 281 F.Supp. 507. A copy of the opinion is appended to appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether the federal anti-injunction statute, 28 U.S.C. § 2283, barred the District Court from enjoining a state court criminal prosecution pending against appellee Harris.
2. Whether the District Court properly reviewed *all* proscriptive sections of the California Criminal Syndicalism Act when but a single section was before the court.
3. Whether, contrary to this Court's holding in *Whitney v. California*, 274 U.S. 357 (1927), the California Criminal Syndicalism Act is, in all of its parts, unconstitutional on its face.

STATUTES INVOLVED

The California Criminal Syndicalism Act, California Penal Code sections 11400-11402. The Act is set forth in full in appellant's Jurisdictional Statement.

STATEMENT

On September 20, 1966, the Grand Jury of Los Angeles County accused appellee Harris of distributing literature advocating terrorism and advising commission of unlawful acts of force and violence as a means of effecting political change and new industrial ownership, contrary to California Penal Code sections 11400 and 11401 (3). The illicit acts allegedly occurred on May 25 and 26, 1966, the occasion of the coroner's inquest into the death of Leonard Deadwyler, killed during a period when tensions generated by the Watts riot pervaded the community.

Harris was arraigned in Los Angeles Superior Court. On December 1, 1966, the trial court denied his motion to dismiss the charges and overruled a demurrer to the indictment. Harris unsuccessfully petitioned for a writ of prohibition in the Court of Appeal for the State of California and in the Supreme Court of California, alleging the unconstitutionality of the statute. The matter was set for trial.

On July 27, 1967, Harris filed in the United States District Court for the Central District of California a complaint under 28 U.S.C. §§ 1331 and 1343 (3), and 42 U.S.C. § 1983, alleging the unconstitutionality

of the Criminal Syndicalism Act, and seeking injunctive relief. Harris was joined by appellees Dan and Hirsch, who alleged that the prosecution pending against Harris inhibited their advocacy of the political program of the Progressive Labor Party, and by appellee Broslawsky, who alleged uncertainty as to whether the Act prohibited him from teaching his students about the doctrines of Karl Marx.

The District Court on August 16, 1967, issued its order convening a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. The matter was heard on October 27, 1967; on March 11, 1968, the District Court declared the Act unconstitutional on its face in all of its parts, and enjoined appellant Younger from further prosecuting appellee Harris for alleged violation of the Act.

Appellant filed notice of appeal on April 9, 1968. This appeal is authorized by 28 U.S.C. § 1253.

On August 19, 1968, appellees moved this Court to affirm the judgment.

I

**THE FEDERAL ANTI-INJUNCTION STATUTE, 28 U.S.C. § 2283,
BARRED THE DISTRICT COURT FROM ENJOINING STATE
COURT PROCEEDINGS PENDING AGAINST APPELLEE
HARRIS.**

Title 28 of the United States Code, section 2283, declares

“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Con-

gress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

While not jurisdictional, section 2283 is certainly a positive congressional mandate and limitation on the equity powers of District Courts. See *Smith v. Apple*, 264 U.S. 274, 278-279 (1924). *Accord, Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964), cert. denied, 381 U.S. 939 (1965). "The prohibition of § 2283 is but continuing evidence of confidence in state courts, reinforced by a desire to avoid direct conflict between state and federal courts." *Clothing Workers v. Richman Bros.*, 348 U.S. 511, 518 (1955).

Despite this Court's admonition that "the prohibition is not to be whittled away by judicial improvisation," *Clothing Workers v. Richman Bros.*, *supra* 515, the District Court, without discussing the fundamental question of the applicability of section 2283, enjoined appellant Younger "from further prosecution of the currently pending action against plaintiff Harris. . ." *Harris v. Younger*, 281 F.Supp. 507, 517 (C.D. Cal. 1968).

This injunction plainly was not necessary in aid of the District Court's jurisdiction, nor to protect or effectuate its judgments. The order was proper only if expressly authorized by Act of Congress.

Plaintiffs proceeded under 42 U.S.C. § 1983. *Harris v. Younger*, *supra* 509. As to whether in 42 U.S.C. § 1983 Congress has authorized an exception to 28 U.S.C. § 2283, the Courts of Appeals are in disagreement. The majority have held that section

1983 created no exception to section 2283. *Baines v. City of Danville, supra; Goss v. State of Illinois*, 312 F.2d 257 (7th Cir. 1963); *Smith v. Village of Lansing*, 241 F.2d 856 (7th Cir. 1957); *Sexton v. Barry*, 233 F.2d 220 (6th Cir.), cert. denied, 352 U.S. 870 (1956). Contra is *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir. 1950), criticized in 74 Harv. L. Rev. 726, 738 (1961), and 78 Harv. L. Rev. 1045, 1050-1051 (1965). Under the weight of authority, the District Court acted improperly. Had the applicability of section 2283 been considered, this error might have been avoided.

The relationship between section 1983 and section 2283 has troubled the District Courts. Compare *Dunn v. Stewart*, 235 F.Supp. 955, 965 (S.D. Miss. 1964), *rev'd on other grounds*, 363 F.2d 591, 597 (5th Cir. 1966), and *Cameron v. Johnson*, 262 F.Supp. 873 (S.D. Miss. 1966), with *Ware v. Nichols*, 266 F.Supp. 564, 569 (N.D. Miss. 1967). In *Ware* a three-judge court declared unconstitutional Mississippi's Criminal Syndicalism Act but refused to enjoin state proceedings thereby avoiding the application of section 2283.

Contributing to this uncertainty is the fact that this Court has in the last three years twice left this issue unresolved. *Dombrowski v. Pfister*, 380 U. S. 479, 484 n. 2 (1965); *Cameron v. Johnson*, 390 U. S. 611, 613 n. 3 (1968). The increasing frequency with which the question is pressed upon the Court reflects an urgent need for authoritative decision. Toward this end, we respectfully urge this Court to note jurisdiction, and

as in *Cameron v. Johnson, supra*, to remand the case to the District Court for an initial determination as to the applicability of section 2283. The District Court's ruling may then be reviewed by this Court.

II

THE DISTRICT COURT EXCEEDED ITS JURISDICTION BY REVIEWING PROVISIONS OF THE CALIFORNIA CRIMINAL SYNDICALISM ACT NOT PROPERLY BEFORE IT.

Appellee Harris was charged with violating only subdivision 3 of California Penal Code section 11401. The District Court, however, reviewed and declared unconstitutional all subdivisions of section 11401. The separate provisions of section 11401 are made severable by Penal Code section 11402.

The District Court lacked power to review section 11401 (1), (2), (4), and (5). The joining of appellees Dan, Hirsch, and Broslawsky was an obvious attempt to confer upon the District Court jurisdiction to review these subdivisions under the Declaratory Judgment Act, 28 U.S.C. § 2201. That attempt must be held a failure.

A declaratory judgment may be entered only when there is presented a case or controversy in the constitutional sense. *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 242 (1952).

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of

sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270, 273 (1941). See *Actna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937).

"For a declaratory judgment action to be maintained, 'there must be at least the ripening seeds of * * * a controversy, that is, a state of facts indicating threatened litigation, in the immediate future, which seems unavoidable, concerning the respective legal rights of the parties.'" *Remington Products Corp. v. American Acropap*, 97 F. Supp. 644, 646-647 (S.D.N.Y. 1951).

As the District Court noted, Dan, Hirsch, and Broslawsky stood in no danger of prosecution under any subdivision of section 11401. *Harris v. Younger*, *supra* 516. If the threat of immediate prosecution is not the *sine qua non* of an actual controversy, certainly no controversy exists in the constitutional sense when there does not appear even remote danger of prosecution. Cf. *Poe v. Ullman*, 367 U.S. 497, 504 (1961). Since appellees Dan, Hirsch, and Broslawsky failed to present a "controversy" within the meaning of either 28 U.S.C. § 2201, or Article III, section 2 of the United States Constitution, their allegations that the Act inhibited them in the exercise of their First Amendment freedoms could not justify review of the entire statutory scheme.

The District Court interpreted this Court's decision in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as justifying its review of section 11401 (1), (2), (4), and (5). *Harris v. Younger*, *supra*, 512. *Dombrowski* ree-

ognizes an exception to the usual rules governing standing: when a statute is challenged on grounds of overbreadth the challenger need not demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Id.* at 486-487. *Dombrowski* does authorize review of *the specific statutory provision attacked* irrespective of its application to the facts presented; *Dombrowski* does not commission federal courts to conduct search and destroy missions in state penal codes.

Our Legislature declared its intention in Penal Code section 11402 that should any provision of the Criminal Syndicalism Act be held unconstitutional, remaining portions of the Act should stand. When by declining to abstain, a federal court denies state courts the opportunity to construe a state statute in a manner consistent with the Constitution, it is particularly appropriate for the federal court to limit its review to those specific provisions of the state statutory scheme properly before it. To do otherwise unnecessarily taxes the delicate federal-state relationship. The District Court acted beyond its power by extending its review to independent subdivisions (1), (2), (4) and (5) of Penal Code section 11401; only section 11401 (3) was properly before the court.

III

THE CALIFORNIA CRIMINAL SYNDICALISM ACT, IN ALL OF ITS PARTS, IS NOT UNCONSTITUTIONAL ON ITS FACE.

In *Whitney v. California*, 274 U.S. 357 (1927), this Court reviewed the California Criminal Syndicalism Act and rejected the very contentions sustained here by the District Court: that the Act denied procedural due process by failing to supply adequate notice of the conduct it condemned; that the Act denied substantive due process by impermissibly regulating conduct falling under the protective cloak of the First Amendment. *Id.* at 368, 371.

Since *Whitney*, the District Court observed, this Court has tested statutes regulating conduct in the area of the First Amendment by increasingly rigorous standards of clarity and precision. For this reason, the District Court felt obliged to consider anew the precise claims raised in *Whitney*. We must take exception to the manner in which the District Court executed its task.

State courts recognize a duty to construe state statutes so as to preserve their constitutionality. The highest state court of New York adhered to this principle recently in upholding that State's criminal anarchy statute. *People v. Epton*, 281 N.Y.S. 2d 9 (1967), *cert. denied*, 390 U.S. 29, 976 (1968). Federal courts will, when possible, supply constitutionally acceptable meaning to the terms of federal statutes. That is what this Court did in upholding the Smith Act in *Yates v. United States*, 354 U.S. 298 (1957). A federal court is under no different obligation when,

by declining to apply the abstention doctrine, it passes on the constitutionality of a state law before the state courts have had the opportunity to review the legislation in light of evolving constitutional doctrines. The District Court, however, failed to discharge this responsibility in holding unconstitutional a statute which, like the Smith Act, is patterned on the New York criminal anarchy law. *Id.* at 309. Cf. *People v. Epton, supra*.

Penal Code section 11400 defines "criminal syndicalism" as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, wilful and malicious damage to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of effecting political change or new industrial ownership.

Penal Code section 11401 (1) condemns "Any person who . . . advocates, teaches or aids and abets criminal syndicalism or the . . . propensity of committing . . . violence . . . as a means of accomplishing a change in industrial ownership or control or effecting any political change. . . ." The District Court, in effect, faulted this provision on the ground that it apparently proscribed teaching or advocacy of abstract doctrine as well as advocacy to action. We believe that the District Court should have construed this language, as the Court of Appeals of New York did in *Epton*, to condemn only advocacy directed at promoting unlawful action. Cf. *Yates v. United States, supra* 318. At the least, the District Court was obliged to read the statute in light of the judicial gloss placed

upon it by our state courts. In *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 545 (1946), Justice Traynor noted that

“The Criminal Syndicalism Act can . . . be applied only when there is imminent danger that the advocacy of the doctrines it seeks to prohibit will give rise to the evils that the state may prevent.”

Accorded this construction, section 11401 (1) is constitutional. *Yates v. United States, supra*; *Dennis v. United States*, 341 U.S. 494 (1951).¹

Penal Code section 11401 (3), the only provision properly at issue, punishes one who “Prints, publishes . . . circulates or publicly displays any . . . paper . . . containing . . . advocacy, teaching, or aid and abetment of, or advising criminal syndicalism. . . .” The District Court found it “hard to see” how this section might be interpreted without subjecting to prosecution persons whose conduct is protected by the First Amendment. Illumination is provided by *People v. Malley*, 49 Cal.App. 597 (1920). Adverting to the clear and present danger test, the court observed that from the facts that the defendant distributed the proscribed literature with a full understanding of its nature, it could be inferred that he did so

¹The District Court encountered difficulty defining “abet.” The terms “aid and abet” have an established meaning: “‘to instigate, encourage, promote, or aid with guilty knowledge of the wrongful purpose of the perpetrator.’” *People v. Camarillo*, 266 A.C.A. 555, 565 (1968). Thus, “aid and abet” are not words which offend the Constitution.

with the intent of bringing about the consequences which could reasonably be anticipated. *Id.* at 611-612. Section 11401 (3), as viewed in *Malley*, meets constitutional requirements; that view should have been the basis for the District Court's construction.

Penal Code section 11401 (4) makes unlawful organizing or knowing membership in an organization formed to advocate, teach or aid and abet criminal syndicalism. This Court has ruled that

"Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from state employment. *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967).

Rather than voiding subdivision 3 on this ground, the District Court should have read into that provision the requirement set down in *Keyishian*. Such an approach would be consistent with interpretations that California courts have placed upon various provisions of the Act. It is not our concept of federalism that a state statute should survive or fail according to whether it is first tested in a state or federal court. Compare *People v. Epton*, *supra*, with *Harris v. Younger*, *supra*.

CONCLUSION

This case presents substantial questions, largely unresolved by the District Court. For this reason we respectfully urge that this Court note jurisdiction and

remand this case to the United States District Court for the Central District of California for initial determination of undecided questions.

Dated, San Francisco, California,
December 11, 1968.

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In the Supreme Court
of the
United States

Office-Supreme Court, U.S.
FILED

FEB 27 1968

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. ~~222~~ # 2

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., et al.,

Appellees.

On Appeal from the United States District Court
for the Central District of California.

BRIEF FOR THE APPELLANT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 163

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., et al.,

Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the United States District Court for
the Central District of California is reported in 281
F.Supp. 507 and is reprinted in the Appendix.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, United States Code, section 1253.

The judgment of the United States District Court for the Central District of California, by a three judge panel, was entered on March 11, 1968. A timely notice of appeal was filed in this Court on April 9, 1968. Probable jurisdiction was noted on January 13, 1969, in 37 U.S. Law Week 3247.

QUESTIONS PRESENTED

1. Whether the District Court exceeded its jurisdiction in reviewing *all* proscriptive sections of the California Criminal Syndicalism Act when but a single section was properly before the court.
2. Whether contrary to this Court's holding in *Whitney v. California*, 274 U.S. 357 (1927), and notwithstanding limiting decisions by our state courts, all provisions of the California Criminal Syndicalism Act are, on their face, unconstitutionally vague and overbroad.
3. Whether the Smith Act, 18 U.S.C. § 2385, preempts the California Criminal Syndicalism Act.
4. Whether the federal anti-injunction statute, 28 U.S.C. § 2283, barred the District Court from enjoining a state court criminal proceeding pending against appellee Harris.

STATUTES INVOLVED

California Penal Code

Section 11400.

"Criminal syndicalism" as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Section 11401.

Any person who:

1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or
2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or
3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or

printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years.

Section 11402.

If for any reason any section, clause or provision of this article shall by any court be held unconstitutional, the Legislature hereby declares that, irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this State all other sections, clauses and provisions of this article.

Title 18, United States Code, section 2385.

Whoever knowingly or wilfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession theref, or the government of any political subdivision therein, by force or violence,

or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

As used in this section, the terms "organizes" and "organize," with respect to any society, group, or assembly of persons, including the re-

cruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.

Title 28, United States Code, section 2283.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 42, United States Code, section 42.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

On September 20, 1966, the Grand Jury of Los Angeles County indicted appellee Harris for distributing literature advocating terrorism and advising commission of unlawful acts of force and violence as a means of effecting political change and new industrial ownership, contrary to California Penal Code sections 11400 and 11401(3). The acts denounced allegedly occurred on May 25 and 26, 1966, the occasion of the County Coroner's inquest into the death of Leonard

Deadwyler, killed during a period when tensions generated by the Watts riot pervaded the community.

Harris was arraigned in Los Angeles Superior Court. On December 1, 1966, the trial court denied his motion to dismiss the charges and overruled a demurrer to the indictment. Harris unsuccessfully petitioned for a writ of prohibition in the Court of Appeal for the State of California and in the Supreme Court of California, alleging the unconstitutionality of the statute. The matter was set for trial.

On July 27, 1967, Harris filed in the United States District Court for the Central District of California a complaint under Title 28, United States Code sections 1331 and 1343(3), and Title 42, United States Code section 1983, alleging the unconstitutionality of the Criminal Syndicalism Act, and seeking injunctive relief. Harris was joined by appellees Dan and Hirsch, who alleged that the prosecution pending against Harris inhibited their advocacy of the political program of the Progressive Labor Party, and by appellee Broslawsky, who alleged uncertainty as to whether the Act prohibited him from teaching his students about the doctrines of economist Karl Marx.

The District Court on August 16, 1967, issued its order convening a three-judge court pursuant to Title 28, United States Code sections 2281 and 2284. The matter was heard on October 27, 1967.

Consequently the three-judge court had before it only the text of sections 11400 and 11401(3). The record does not disclose the nature of the conduct allegedly engaged in by plaintiff Harris, whether his

conduct was constitutionally protected, the social context or matrix of his action, whether there was in fact a clear and present danger of violence or terrorism, or indeed any of the facts or circumstances which were the basis for the criminal charge.

The other appellees—Dan, Hirsch and Broslawsky—were not under indictment and sought to attack the portions of the Criminal Syndicalism Act not involved in the Harris prosecution on the basis of their allegations that the existence of the California law in effect “chilled” the exercise of their rights under the First Amendment. No proof was ever presented of this claim. Even the three-judge court acknowledged that, “. . . our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky stand in any danger of prosecution by the respondent, the present District Attorney of Los Angeles County, because of the activities that they ascribed to themselves in the complaint. . . .” *Harris v. Younger*, 281 F.Supp. 507, 516 (C.D. Cal. 1968).

Nevertheless, while it was undisputed that the plaintiff Harris was being prosecuted under only one section of the Act and the other plaintiffs were in no danger of prosecution under the remaining sections, the three-judge court on March 11, 1968, proceeded to hold unconstitutional all of the provisions of the California Criminal Syndicalism Act. The court further enjoined appellant Younger from further prosecuting Harris under the Act. It did this without knowledge of all the facts and circumstances which

were the basis for the prosecution. It did this without recognition of, much less deference to, the judicial gloss attached to the law by state courts in the past fifty years.

Appellant filed notice of appeal on April 9, 1968. The appeal was docketed on June 6, 1968. On August 19, 1968, appellees moved to dismiss or affirm. This Court noted probable jurisdiction on January 13, 1969.

SUMMARY OF ARGUMENT

The judgment declaring the California Criminal Syndicalism Act unconstitutional on its face should be reversed. Limiting state court decisions make it clear that the Act does not suffer from the constitutional defects of vagueness and overbreadth.

Further, sections 11401(1), 11401(2), 11401(4), and 11401(5) are not properly before the federal courts, no case or controversy having arisen under these provisions.

The Smith Act, 18 U.S.C. § 2385, does not preempt the California Criminal Syndicalism Act in light of *Uphaus v. Wyman*, 360 U.S. 72 (1959). Moreover, as the purpose and scope of the federal and state statutes do not conflict or coincide, federal preemption of the state legislation may not be implied.

Finally, the order issued by the District Court enjoining appellant Younger from proceeding with the pending criminal prosecution of appellee Harris violates the federal anti-injunction statute, 28 U.S.C. § 2283.

ARGUMENT**I**

THE CALIFORNIA CRIMINAL SYNDICALISM ACT IS NOT, IN ALL OF ITS PROVISIONS, UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

A. Background.

The California Syndicalism Act was enacted as an urgency measure in 1919, when active radical minorities threatened the stability of the existing political and social structure by force and violence. Cal. Stats. 1919, ch. 288, p. 281. The bulk of syndicalism prosecutions were brought within the next five years. The statute rarely was invoked in the 1930's, and, apparently, lay dormant thereafter until now.

The District Court's treatment of the Act indicates that it may have regarded the statute as an historical vestige of the 1920's, a dead letter law no longer vindicating a compelling State interest. One commentator has suggested that a finding of vagueness may evidence a judicial view that the statute voided does not protect a vital interest. 81 Harv. L. Rev. 110, 168 n. 20 (1967).

It is our misfortune that the Criminal Syndicalism Act is not an anachronism. The circumstances which preceded its enactment plague us once again. Politically motivated acts of violence and sabotage threaten to become commonplace; militant organizations and anarchists mount violent attacks against California's citizens and institutions with increasing frequency. In 1965 our Legislature deemed it necessary to forbid paramilitary organizations training in guerrilla war-

fare and sabotage to assemble for the purpose of practicing with weapons, Cal. Pen. Code § 11460.

We believe that the State has a no less compelling interest in regulating conduct under the Criminal Syndicalism Act than the federal government has in prohibiting certain activities under the Smith Act. If the overthrow of the national government is a greater evil than the acts of violence which the state law seeks to prevent, experience demonstrates that the former danger is far less likely to be realized than is the latter. The State deserves the chance to prove that the acts condemned by our statute create a clear and present danger of violence, or indeed, resulted in violence.

The Syndicalism Act is directed at three evils: violent overthrow of state and municipal governments; displacement of the peaceful democratic process by collective acts of terrorism by anarchists or revolutionaries and reciprocal acts of violence by defenders of the status quo; individual acts of violence directed toward persons who represent local government and individual acts of sabotage against private industry.

In passing upon our statute this Court should be apprised that there now exist within this State militant organizations whose purpose is to accomplish the first two evils and whose practice is to promote the third. They have destroyed public and private property, have attempted to destroy political and educational institutions, and have assassinated persons assigned to the task of preserving order. That the

Court may fully appreciate our predicament we give space here to three such militant groups, extremists of the left and right, apostles of violence both black and white.

"The Black Panther" is the newspaper of the Black Panther Party for Self-Defense. On November 16, 1968, "The Black Panther" offered a full page of detailed instructions on how to make "Grenades and Bombs: Anti-Property and Anti-Personnel." A copy of that article is appended to our brief.

Reproduced also is a photograph of San Francisco police officer, Michael O'Brien, captioned "Wanted Dead for Murder." His picture appeared in the Panther periodical on October 12 and 19, 1968, November 2, 1968, and on January 25, 1969. Officer O'Brien received a death threat on February 11, 1969. San Francisco Examiner, Wed., Feb. 12, 1969, p. 7, col. 1.

A Black Panther cartoon depicting a wounded police officer and bearing the caption "This pig will be back—Don't let this happen—Shoot to kill," is included.¹ Lest this be thought advocacy of abstract doctrine, it should be noted that Panther Defense Minister Huey P. Newton recently was convicted of slaying a police officer in Oakland, California. Earlier, armed members of the Black Panther Party appeared uninvited on the floor of our Legislature. Six Black Panthers are to stand trial presently for allegedly ambushing Oakland police officers. Recently, on the

¹Strikingly similar rhetoric by anarchists preceded the Haymarket Square riot, where a large number of policemen were killed. *The Anarchists' Case*, 12 N.E. 865, 880-881 (Ill. 1887).

U.C.L.A. campus, two Panthers were shot and killed, allegedly by members of the rival militant organization, US.

Students for a Democratic Society, SDS, is a white organization. Reprinted here is a circular intended for SDS members, entitled "What Must We Do Now? An Argument for Sabotage As the Next Logical Step Toward Obstruction and Disruption of the U. S. War Machine." This position paper tells how to construct and use bombs. Bomb diagrams have been deleted from the reprint.

Between February 25 and October 3, 1968, the following bomb incidents occurred in the San Francisco Bay Area: eight public utility towers, substations and telephone cables were bombed; the Berkeley, California, Draft Board was bombed; two bombs exploded on the campus of the University of California at Berkeley, one partially destroying the United States Navy ROTC building; three business and industrial sites were bombed; bombs exploded in the Oakland Police Department Building and in the Alameda County Courthouse.

In February of 1969, nine persons were arrested on the San Francisco peninsula. Charges of conspiracy, criminal syndicalism, possession of illegal weapons, and possession of explosives were lodged against them. The group was linked to some of the thirty-one bombings, shootings, and acts of sabotage which occurred in the mid-peninsula region between October 15, 1968, and January 30, 1969. In the presence of an undercover officer, certain of the defendants conspired to

bomb and tear gas persons attending a Mao-Tse-Tung class at a local church. See San Francisco Examiner, Sunday, February 16, 1969, p. 1, cols. 3-8.

Discovered in the conspirators' homes were large quantities of firearms and ammunition, grenades, bombs, gun powder and other ingredients for explosives, and American Nazi Party literature. A dated edition of the Nazi periodical "The Storm Trooper" was found, featuring these appeals to reason: "When They Burn the Flag . . . IT'S TIME FOR VIOLENCE," and "TERRORISM the only answer to TERRORISM," specifically condemning the Black Panthers. This material is reproduced and appended. Other items found included a poster exhorting "White People! Fight Against THE BLACK PLAGUE, EVERY 30 MINUTES . . . A WOMAN IS RAPED SOMEWHERE IN THE U.S.A. WHITE MAN! WHAT DOES IT TAKE TO MAKE YOU FIGHT? JOIN THE AMERICAN NAZIS!"

It is obvious that hate literature necessarily lends an aura of legitimacy to violence and reinforces the distorted perceptions of sick minds. Less obvious, usually, is the immediate causal connection between incitement and action. To deny that connection, however, is to defy common sense and experience. The First Amendment was intended as a shield not a sword; but in warring upon one another extremists left and right have learned that speech is, quite literally, a lethal weapon. The Criminal Syndicalism Act, properly construed, is a much needed protective measure. The State must be afforded the opportunity

to show that incitements like those recited create a clear and present danger of violent action.

B. The California Criminal Syndicalism Act, as construed by our state courts, is not unconstitutionally vague or overbroad.

In *Whitney v. California*, 274 U.S. 357 (1927), this Court reviewed the California Criminal Syndicalism Act and rejected the very contentions sustained here by the District Court: that the Act denied procedural due process by failing to supply adequate notice of the conduct it condemned; that the Act denied substantive due process by impermissibly regulating conduct falling under the protective mantle of the First Amendment. *Id.* at 368, 371.

Since *Whitney*, the District Court observed, this Court has tested statutes regulating conduct in the area of the First Amendment by increasingly rigorous standards of clarity and precision. For this reason, the court felt obliged to consider anew the precise claims raised in *Whitney*. We accept this premise but take grave exception to the manner in which the District Court approached its task.

We urge that the California Criminal Syndicalism Act, as construed by our state courts and by this Court, is constitutional.

In construing the Syndicalism Act, the District Court completely ignored several decisions by California appellate courts limiting and clarifying the terms of the statute. This is difficult to understand, since federal courts are bound by a state court's interpretation of its own law.

Penal Code section 11400 defines "criminal syndicalism" as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, wilful and malicious damage to physical property, or unlawful acts of force and violence or unlawful methods of terrorism as a means of effecting political change or new industrial ownership.

Penal Code section 11401(1) condemns "Any person who . . . advocates, teaches or aids and abets criminal syndicalism or the . . . propensity of committing . . . violence . . . as a means of accomplishing a change in industrial ownership or control or effecting any political change . . ."

The District Court faulted section 11401(1) on related grounds of vagueness and overbreadth. Since "advocacy" is prohibited, teaching *about* criminal syndicalism might be punishable, the court reasoned. And

"even if the Act were to be construed as including only the type of teaching that involves advocacy, it is still overbroad in its prohibition, because the advocacy condemned is not limited to the 'Action now!!' variety." *Harris v. Younger, supra*, 513.

Aside from demanding that the requirement of a clear and present danger appear upon the face of the statute, a novel concept, the "Action now!!" test blithely ignores that

"The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to

immediate action . . ." may, under limited circumstances, be proscribed. *Yates v. United States*, 354 U.S. 298, 321 (1957). See *Dennis v. United States*, 341 U.S. 494 (1951).

More disconcerting, however, is the District Court's failure to acknowledge that the California Supreme Court has, in effect, limited the reach of our statute to advocacy of immediate action. In *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 171 P.2d 885, 891 (1946), Justice Traynor noted that

"The Criminal Syndicalism Act can . . . be applied only when there is imminent danger that the advocacy of the doctrines it seeks to prohibit will give rise to the evils that the state may prevent."

From this limiting construction it is clear that the Act proscribes only advocacy directed at promoting imminent unlawful action. *Danskin*, by limiting the statute, clarifies any vague language and eliminates overbreadth. *People v. Malley*, 49 Cal.App. 597, 611, 194 Pac. 48, 54 (1920), discussed within, confirms that the Act extends only to advocacy intended to produce illegal acts.

Thus construed, the Criminal Syndicalism Act parallels the Smith Act, and is constitutional under *Dennis v. United States, supra*, and *Yates v. United States, supra*, which establish that intentional advocacy of unlawful action is not protected speech. The Smith Act and the California law must stand or fall together.

The District Court found unconstitutionally vague the terms "aid" and "abet," as used in section 11401(1). Again, our state courts have supplied the defect assigned below. "Aid" and "abet" have an established meaning: "'to instigate, encourage, promote, or aid with guilty knowledge of the wrongful purpose of the perpetrator.'" *People v. Camarillo*, 26 A.C.A. 555, 565, 72 Cal.Rptr. 296, 301 (1968). *Danskis* and *Camarillo* make untenable the District Court's suggestion that the terms "aid" and "abet" would encompass innocent influencing, counseling, or advising. Surely, since 1872, when the terms "aid" and "abet" appeared in our Penal Code, they have acquired a clearly ascertainable meaning.

Even without the judicial gloss supplied by our state courts, the District Court should have interpreted the Criminal Syndicalism Act so as to preserve its constitutionality in light of intervening decisions by this Court. The District Court had no different responsibility than the Court of Appeals of New York had when confronted with a state criminal anarchy statute unconstitutional as previously construed. *People v. Epton*, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), cert denied, 390 U.S. 29, 976 (1968).

State courts recognize a duty to construe state statutes so as to preserve their constitutionality. See, e.g., *City of Los Angeles v. Belridge Oil Co.*, 48 Cal. 2d 320, 324, 309 P.2d 417, 419 (1957). The highest court of New York observed this principle recently in upholding that State's criminal anarchy statute. *People v. Epton*, *supra*. Federal courts will, when

possible, supply constitutionally acceptable meaning to the terms of federal statutes. *American Communications Assn. v. Douds*, 339 U.S. 283, 407 (1950). This Court adhered to that rule in upholding the Smith Act, in *Dennis v. United States*, 341 U.S. 494 (1951), *Yates v. United States*, 354 U.S. 298 (1957), and *Scales v. United States*, 367 U.S. 203 (1961).

The recent decline of the abstention doctrine in First Amendment cases, *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Zwickler v. Koota*, 389 U.S. 241 (1967), *Cameron v. Johnson*, 390 U.S. 611 (1968), coincides with the emergent practice of federal courts passing upon state statutes in declaratory judgment actions. State courts are thus denied the initial opportunity to preserve the constitutionality of state statutes while federal courts are forced to rule on the validity of the broadest possible literal applications of state laws. This development places new and severe tensions upon our federal system.² Federal courts should now recognize an obligation to construe state statutes so as to save them from valid constitutional objections, on the assumption that the state courts would do no less. Such a rule is implicit in this Court's language in *Fox v. Washington*, 236 U.S. 273, 277 (1915):

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed . . . ; and it

²The District Court commented that plaintiffs did not ignore the state courts. *Harris v. Younger*, *supra*, 510. Plaintiffs Dan, Hirsch, and Broslawsky did not challenge the Syndicalism Act in California courts.

is to be presumed that state laws will be construed in that way by the state courts."

The principle we suggest was not followed below. In *Dennis v. United States, supra*; *Yates v. United States, supra*, and *Scales v. United States, supra*, this Court construed the Smith Act so as to uphold its constitutionality. The Smith Act closely parallels the California Syndicalism Act, both statutes finding common ancestry in the New York Criminal Anarchy Act. *Yates v. United States, supra*, 307-309; *Dennis v. United States, supra*, 562 n.2 (concurring opinion of Mr. Justice Jackson). But the District Court chose to ignore the example of *Dennis*, *Yates*, and *Scales*, on the theory that those cases were rejected by *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). In misreading *Keyishian*, the District Court failed to discharge its burden under the federal system.

The only provisions of the Syndicalism Act properly at issue are Penal Code section 11400, defining criminal syndicalism, and section 11401(3), which punishes one who "Prints, publishes . . . circulates or publicly displays any . . . paper . . . containing . . . advocacy, teaching, or aid and abetment of, or advising criminal syndicalism . . ." The District Court found it "hard to see" how this section might be interpreted without subjecting to prosecution magazine editors, sidewalk news vendors, and other persons whose conduct is protected by the First Amendment.

Again, the District Court's difficulty stems from its failure to consider a relevant state court decision.

Penal Code section 11401(3) was construed in *People v. Malley*, 49 Cal.App. 597, 194 Pac. 48 (1920). The Court of Appeal said

"We are satisfied from the record that the defendant distributed the literature under his control and in his possession with full understanding of its nature; and this, of itself, furnished a ground for attributing to him an intent to bring about, and for finding that he was thereby attempting to bring about, any and all such consequences as might reasonably be anticipated from its distribution." *Id.* at 611, 194 Pac. at 54.

Malley establishes that to come within the proscription of the statute, (1) the accused must fully understand the nature of the material he distributes, contrast *Smith v. California*, 361 U.S. 147 (1959), and (2) the accused must intend to bring about the unlawful consequences reasonably attributable to his act of distribution. *Malley* further recognized that the section could be applied only to acts posing a clear and present danger. *Id.* at 612, 194 Pac. at 54.

This interpretation brings section 11401(3) into conformance with the parallel provision in its federal analogue, the Smith Act, apparently approved recently in *Keyishian v. Board of Regents*, 385 U.S. 589, 600 n.8 (1967).

Penal Code section 11401(4) makes unlawful organizing, or knowing membership in, an organization formed to advocate, teach, or aid and abet criminal syndicalism. None of the appellees have been charged under this section; none shows that he is inhibited

from organizing or joining any group by virtue of this section.

The District Court found that section 11401(4) permitted prosecution on the basis of membership alone and was, therefore, unconstitutional in light of *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *United States v. Robel*, 389 U.S. 258 (1967). The District Court ignored the fact that section 11401(4) condemns separate crimes: organizing and knowing membership. One cannot organize without knowledge of organizational purposes and an intention to further those purposes. Thus, the elements of knowledge and purpose, read into virtually identical language in the Smith Act in *Scales*, inhere in the crime of organizing denounced in section 11401(4). The District Court erred in concluding that if the membership clause of section 11401(4) failed, the organization clause, made severable by section 11402, was also unconstitutional.

In *Whitney v. California*, 274 U.S. 357 (1927), the Court passed upon section 11401(4), holding that "The language of § 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear; the definition of 'criminal syndicalism' specific." *Id.* at 368. The Court added that

"The Act, plainly, meets the essential requirement of due process that a penal statute be 'sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common in-

telligence must necessarily guess at its meaning and differ as to its application.' *Connally v. General Construction Co.*, 269 U.S. 385, 391." *Ibid.*

It may be noted that Justices Holmes and Brandeis, concurring in *Whitney*, agreed with the majority that the statute was valid.

In *Scales v. United States*, 367 U.S. 203 (1961), this Court interpreted the membership clause of the Smith Act to penalize only active members having guilty knowledge and intent. *Id.* at 221-222. Thus narrowed, the statute was held constitutional. That interpretation was possible, *Aptheker* explains, *Id.* at 511 n.9, because the Smith Act explicitly required that a defendant must know of the organization's illegal purposes. No parallel provision existed in sections 5 and 6 of the Subversive Activities Control Act, construed in *Aptheker* and *Robel*. No similar provision is written into the Syndicalism Act. However, California courts have consistently held that "knowledge of the purposes of the organization is an essential element of the crime . . ." denounced in section 11401(4). *People v. Flanagan*, 65 Cal.App. 268, 276, 223 Pac. 1014, 1017 (1924). Accord, *People v. Roe*, 58 Cal.App. 690, 703, 209 Pac. 381, 387 (1922); *People v. Powell*, 71 Cal.App. 500, 504-505, 236 Pac. 311, 312 (1925); *People v. Johansen*, 66 Cal.App. 343, 348, 226 Pac. 634, 636 (1924); *People v. Steelik*, 187 Cal. 361, 374, 203 Pac. 78, 83 (1921). Therefore, *Aptheker* and *Robel* are inapposite and section 11401 (4) is not different from the membership clause upheld in *Scales*.

The District Court, omitting any mention of *Scales* in its discussion of section 11401(4), relied heavily upon *Elfbrandt* and *Keyishian*.³ Those were loyalty oath cases, not prosecutions under a criminal statute. *Elfbrandt* involved a law designed to expel subversive persons from positions of state employment. Significantly, the Arizona law there construed had twice been before the state supreme court, once on remand from this Court for consideration in light of *Baggett v. Bullitt*, 377 U.S. 360 (1964). The Arizona Supreme Court held that the state's loyalty oath was not afflicted with unconstitutional uncertainties. This Court disagreed, and being bound by the state court interpretation, was forced to hold the statute unconstitutional. *Keyishian* involved a statutory scheme made vague by virtue of its complexity alone. The New York statutes sought to regulate speech in academic circles, where First Amendment freedoms require the greatest protection. Thus, *Elfbrandt* and *Keyishian* are readily distinguished from our case.

Scales may be reconciled with *Elfbrandt* and *Keyishian* in two ways. First, we might assume that *Scales* is overruled. Neither subsequent decision, however, purports to dispatch *Scales*. Indeed, the *Scales* approach was utilized recently in *Samuels v. Mackell*, 288 F.Supp. 348, 353 n.5 (S.D.N.Y. 1968). The alternative explanation is that a federal statute regulating freedom of association will be so inter-

³In *Elfbrandt* the scienter requirement was written into the statute; in *Keyishian* the Court reviewed a statute upheld earlier in *Adler v. Board of Education*, 342 U.S. 485 (1952), in view of a judicially imposed requirement of knowledge. *Id.* at 494.

preted as to remove constitutional flaws, as in *Scales*, whereas similar state statutes will be construed strictly, as in *Elfbrandt* and *Keyishian*.

The difference in the Court's approach to analogous federal and state provisions, it has been suggested, reflects a view that the federal government has the more compelling interest in regulating associative conduct. 81 Harv. L. Rev. 110, 168 n.20 (1967). That notion, however, was rejected in *Uphaus v. Wyman*, 360 U.S. 72 (1959).

The Syndicalism Act should be construed as was the Smith Act to proscribe only knowing membership in an organization with specific intent to further its unlawful aims. California's interest here is certainly *no less* compelling than that of the federal government. Further, we believe that when, by declining to apply the abstention doctrine, federal courts deny state courts the opportunity of construing state statutes in conformity with constitutional requirements, federal courts have a duty to construe state laws so as to uphold them. It runs contrary to our concept of federalism that a state statute should survive or fail according to whether it is first tested in a state or federal court. Compare *People v. Epton*, *supra* and *Samuels v. Mackell*, *supra*, with *Harris v. Younger*, *supra*.

Penal Code section 11401(2) is not properly before the Court, as appellee Harris was charged under a different section, and appellees Dan, Hirsch, and Broslawsky were not in danger of being charged under any section. We note, however, that section

11401(2) is couched in substantially the same language as New York Penal Law section 161(3), part of the criminal anarchy law upheld in *People v. Epton, supra*, and in *Samuels v. Mackell, supra*.

Similarly, section 11401(5) is not before this Court. This section applies to the violent and unlawful acts specified in section 11400, defining criminal syndicalism. The District Court properly conceded that section 11401(5) reaches "conduct amounting to force or violence or incitement that properly may be punished, and which conceivably may not be covered by other criminal statutes." *Harris v. Younger, supra* 516. This section clearly punishes conduct not speech. Cf. *Cox v. Louisiana*, 379 U.S. 559, 564 (1965). It was held vague by the District Court under the standard for certainty articulated in *Lanzetta v. New Jersey*, 396 U.S. 451, 453 (1939). *Lanzetta*, however, does not posit a test different from that announced in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). In *Whitney* this Court held the Criminal Syndicalism Act valid under *Connally*. We submit that the District Court erred in holding section 11401(5) unconstitutional.

II

THE DISTRICT COURT EXCEEDED ITS JURISDICTION BY REVIEWING PROVISIONS OF THE CALIFORNIA CRIMINAL SYNDICALISM ACT NOT PROPERLY BEFORE IT.

Appellee Harris was charged with violating only subdivision 3 of California Penal Code section 11401. The separate clauses and provisions of section 11401

are of discrete efficacy and are declared severable in Penal Code section 11402. The District Court, however, reviewed and declared unconstitutional all subdivisions of section 11401.

The District Court lacked power to review subdivisions 1, 2, 4 and 5 of Section 11401. The joining of appellees Dan, Hirsch, and Broslawsky was an obvious attempt to confer upon the District Court jurisdiction to review these provisions under the Declaratory Judgment Act, 28 U.S.C. § 2201. That attempt must be held a failure.

A declaratory judgment may be entered only when there is presented a case or controversy in the constitutional sense. *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 242 (1952).

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270, 273 (1941). See *Actna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-241 (1937).

"For a declaratory judgment action to be maintained, 'there must be at least the ripening seeds of * * * a controversy, that is, a state of facts indicating threatened litigation, in the immediate future, which seems unavoidable, concerning the respective legal rights of the parties.'" *Remington Products Corp. v. American Aerovap*, 97 F. Supp. 644, 646-647 (S.D.N.Y. 1951).

As the District Court accurately noted, Dan Hirsch, and Broslawsky stood in no danger of prosecution under any subdivision of section 11401. *Harris v. Younger*, 281 F.Supp. 507, 516 (1968). If the threat of immediate prosecution is not the *sine qua non* of an actual controversy, certainly no controversy exists in the constitutional sense when there does not appear even remote danger of prosecution. Cf. *Poe v. Ullman*, 367 U.S. 497, 504 (1961). Since appellees Dan, Hirsch, and Broslawsky failed to present a "controversy" within the meaning of either 28 U.S.C. § 2201, or Article III, section 2 of the United States Constitution, their allegations that the Act inhibited them in the exercise of their First Amendment freedoms could not justify review of the entire statutory scheme.

The District Court interpreted this Court's decision in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as justifying its review of section 11401 (1), (2), (4), and (5). *Harris v. Younger*, *supra* 512. *Dombrowski* recognizes an exception to the usual rules governing standing: when a statute governing conduct in the area of the First Amendment is challenged on grounds of overbreadth the challenger need not demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. *Id.* at 486-487. *Dombrowski* does authorize review of the specific statutory provision attacked irrespective of its application to the facts presented; *Dombrowski* does not commission federal courts to conduct search and destroy missions in state penal codes.

Our Legislature declared its intention in Penal Code section 11402 that should any provision of the Criminal Syndicalism Act be held unconstitutional, remaining portions of the Act should stand. When by declining to abstain, a federal court denies state courts the proper opportunity to construe a state statute in a manner consistent with the Constitution, it is particularly appropriate for the federal court to limit its review to those specific provisions of the state statutory scheme properly before it. To do otherwise unnecessarily taxes the delicate federal-state relationship. The District Court acted beyond its power by extending its review to independent subdivisions (1), (2), (4) and (5) of Penal Code section 11401; only section 11401 (3) was properly before the court.

We ask only that federal courts approach our Syndicalism Act in the manner in which this Court construed the Smith Act, 18 U.S.C. § 2385: by limiting review to those provisions necessarily at issue. See *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961).

Mr. Justice Frankfurter, in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961), summarized our position with enviable lucidity:

"Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. *United Public Workers v. Mitchell*, 330 U.S. 75; *International Longshoremen's Union v. Boyd*, 347 U.S.

222. Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.' *Watson v. Buck*, 313 U.S. 387, 402. No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'

III

THE CALIFORNIA CRIMINAL SYNDICALISM ACT, INSOFAR AS IT DENOUNCES CONDUCT DIRECTED TOWARD STATE AND MUNICIPAL GOVERNMENTS, HAS NOT BEEN PREEMPTED BY THE SMITH ACT.

In their complaint below appellees contended that the California Criminal Syndicalism Act has been preempted by subsequently enacted federal anti-sedition legislation. The District Court avoided this question by erroneously ruling the Syndicalism Act unconstitutional. Confident that this error now will be remedied we set forth our argument on the implied preemption issue.

The Smith Act, 18 U.S.C. § 2385, in 1940, made advocacy of the forceful overthrow of "the government of the United States or the government of any State, Territory, District or Possession thereof, or

the government of any political subdivision therein . . ." a federal crime.

In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Pennsylvania Sedition Act was before this Court. That statute specifically condemned seditious conduct directed toward the federal government; the accused's conduct was, in fact, directed wholly at the overthrow of the federal government. The Court held that the Smith Act, by implication, "supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct." *Id.* at 499.

While the Court carefully noted that its decision did not limit the right of a State to protect itself at any time against sabotage or attempted violence of all kinds, *id.* at 500, the broad statement that "Congress has intended to occupy the field of sedition . . .," *id.* at 504,⁴ was misunderstood. Mr. Justice Reed, dissenting, emphasized that the field occupied was limited to sedition against the *federal government*. *Id.* at 513. Nevertheless, some, narrowly fastening upon the broad language quoted above, concluded that *Nelson* held that the Smith Act preempted the field of sedition against *all government*, thereby superseding state statutes protecting state and municipal governments.

This misconception, shared by appellees, was laid to rest in *Uphaus v. Wyman*, 360 U.S. 72 (1959),

⁴Cf. 18 U.S.C. § 3231:
"• • •

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

and again in *DeGregory v. New Hampshire*, 383 U.S. 825 (1966). *Uphaus* clarified *Nelson*:

"In *Nelson* itself we said that the 'precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct*.' . . . The opinion made clear that a State could proceed with prosecutions for sedition against the State itself. . . . Nor did our opinion in *Nelson* hold that the Smith Act had proscribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the State had full power to deal with internal civil disturbances. Thus . . . the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill." *Uphaus v. Wyman, supra*, 76-77.

Unlike the Pennsylvania Sedition Act, the California Criminal Syndicalism Act does not in explicit terms purport to govern seditious conduct directed at the national government. At all events, after *Uphaus* it cannot be seriously contended that our Syndicalism Act, insofar as it proscribes conduct directed at local governments, is preempted by the Smith Act.⁵

Appellees preemption argument is defective for these additional reasons. The Syndicalism Act, which

⁵Accord, Comment, 73 Harv. L. Rev. 126, 163 (1959); Note, 33 So. C.L.R. 92, 93 (1959); Note, 28 Geo. Wash. L. Rev. 457 (1960); Note, 38 Texas L. Rev. 330 (1960).

is not purely an anti-sedition measure, prohibits acts not made criminal by the Smith Act: advocacy of violent acts directed at accomplishing a change in industrial ownership; advocacy of sabotage, commission of crimes, and unlawful acts of terrorism. The Smith Act was intended to prevent an organized violent revolution overthrowing existing government; the Syndicalism Act aimed to prevent individual sporadic acts of violence committed by anarchist or revolutionary elements, organized or unorganized. Since the federal and California statutes coincide neither in purpose nor scope there is no basis for finding in the Smith Act a congressional intent to preempt the California Syndicalism Act.

A determination that a state statute intrudes upon an area of exclusive federal jurisdiction renders the state laws inoperative, not invalid. The state legislation is unenforceable only to the extent that it conflicts or coincides with federal legislation. Provisions which neither contravene nor duplicate federal law remain valid and operative. The California Syndicalism Act condemns acts not permitted or prohibited by the Smith Act. Therefore, whether *Nelson* is interpreted as in *Uphaus*, or as by appellees, the Syndicalism Act contains vital provisions under which appellee Harris may be prosecuted.

IV

THE FEDERAL ANTI-INJUNCTION STATUTE, 28 U.S.C. § 2283,
BARRED THE DISTRICT COURT FROM ENJOINING STATE
COURT CRIMINAL PROCEEDINGS PENDING AGAINST
APPELLEE HARRIS.

Title 28 of the United States Code, section 2283, declares:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

While not jurisdictional, section 2283 is certainly a positive congressional mandate and limitation on the equity powers of District Courts. See *Smith v. Apple*, 264 U.S. 274, 278-279 (1924). *Accord, Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965) "The prohibition of § 2283 is but continuing evidence of confidence in state courts, reinforced by a desire to avoid direct conflict between state and federal courts." *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 518 (1955). Cf. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940).

Despite this Court's admonition that "the prohibition is not to be whittled away by judicial improvisation," *Amalgamated Clothing Workers v. Richman Bros. Co., supra*, 515, the District Court, without discussing the fundamental question of the applicability of section 2283, enjoined appellant Younger "from further prosecution of the currently pending

action against plaintiff Harris. . . ." *Harris v. Younger*, 281 F.Supp. 507, 517 (C.D. Cal. 1968).

This injunction plainly was not necessary in aid of the District Court's jurisdiction, nor to protect or effectuate its judgments. The order was proper only if expressly authorized by Act of Congress.

Plaintiffs proceeded under 42 U.S.C. § 1983. *Harris v. Younger*, *supra*, 509. "[T]he Civil Rights Act . . . creates a federal cause of action but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids." *Baines v. City of Danville*, *supra*, 589.⁶

In *Baines*, the United States Court of Appeals for the Fourth Circuit, sitting en banc, reviewed comprehensively the history of the anti-injunction statute. It was noted that this Court

"has consistently applied the statute, or the underlying and closely related principles of comity to foreclose interference by the lower federal courts with state court proceedings involving asserted deprivations of civil rights." *Id.* at 588.

Indeed, this Court has been disposed to construe strictly section 2283. See *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941); *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511 (1955). Strict construction is proper given the

⁶Whether section 1983 constitutes an exception to section 2283 was a question left unresolved in *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965), and in *Cameron v. Johnson*, 390 U.S. 611, 613 n.3 (1968). Cf. *City of Greenwood v. Peacock*, 384 U.S. 808, 829 (1966).

coincidence of the congressional command and judicial principles of equity and comity, and the policy of preventing needless friction between state and federal courts.

In accord with *Baines* are *Goss v. State of Illinois*, 312 F.2d 257 (7th Cir. 1963); *Smith v. Village of Lansing*, 241 F.2d 856 (7th Cir. 1957); and *Sexton v. Barry*, 233 F.2d 220 (6th Cir.), cert. denied, 352 U.S. 870 (1956).

Contra is *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir. 1950). Since the Third Circuit did not reveal its reasoning in *Cooper*, only its holding has been challenged.

"[I]f the principle in *Cooper* were allowed to prevail, it could lead to frequent disruption of state criminal proceedings. Every question of procedural due process might provide a basis for delay of state administration of justice. Therefore, if Congress meant to allow federal injunctions in such cases, it would seem desirable to require it to express its meaning more clearly than in the Civil Rights Acts." Note, 74 Harv. L. Rev. 726, 738 (1961). *Accord*, Note, 78 Harv. L. Rev. 1045, 1050-1051 (1965).

By clear implication, the American Law Institute has concluded that section 1983 does not constitute an exception to section 2283. The Institute has proposed a statute which "goes beyond present law" to permit an injunction in certain civil rights cases. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, § 1372, p. 42, Tent. Draft No. 6 (1968).

We submit that the plain language of section 2283 means what it says and constitutes a positive direction by Congress that an injunction shall not issue in this case. The statutory language may be accorded its intended meaning without denying adequate remedies to plaintiffs suing under the Civil Rights Act, for civil and criminal liability attends deprivation of federally protected rights. See *Monroe v. Pape*, 365 U.S. 167 (1961); *United States v. Guest*, 383 U.S. 745 (1966).

It is, moreover, not altogether clear that the injunction forbidden by section 2283 would accomplish more than a declaratory judgment pronouncing a state statute invalid. In *Ware v. Nichols*, 266 F.Supp. 564, 569 (N.D. Miss. 1967), the District Court safely assumed that

“our declaration that the Criminal Syndicalism Act is unconstitutional is appropriate relief without the necessity of the court’s issuing an injunction. We may assume that the state and county officials will withhold any action to enforce the Act, until a final judgment is rendered.”

Should the disposition of remaining issues not moot this question, as occurred in *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965), and in *Cameron v. Johnson*, 390 U.S. 611, 613 n. 3 (1968), we urge the Court to hold that by virtue of 28 U.S.C. § 2283, the District Court was barred from enjoining the pending state criminal prosecution of appellee Harris. We ask that the Court adhere to the view expressed in *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951):

"The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 U.S.C. §§ 1341, 1342, 2283, 2284(5)." And see *Hill v. Martin*, 296 U.S. 393, 403 (1935).

CONCLUSION

For the stated reasons we respectfully urge that the judgment below declaring the Criminal Syndicalism Act unconstitutional on its face be reversed and that the injunction restraining appellant Younger from proceeding with the criminal prosecution pending against appellee Harris be dissolved.

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(Appendix Follows)

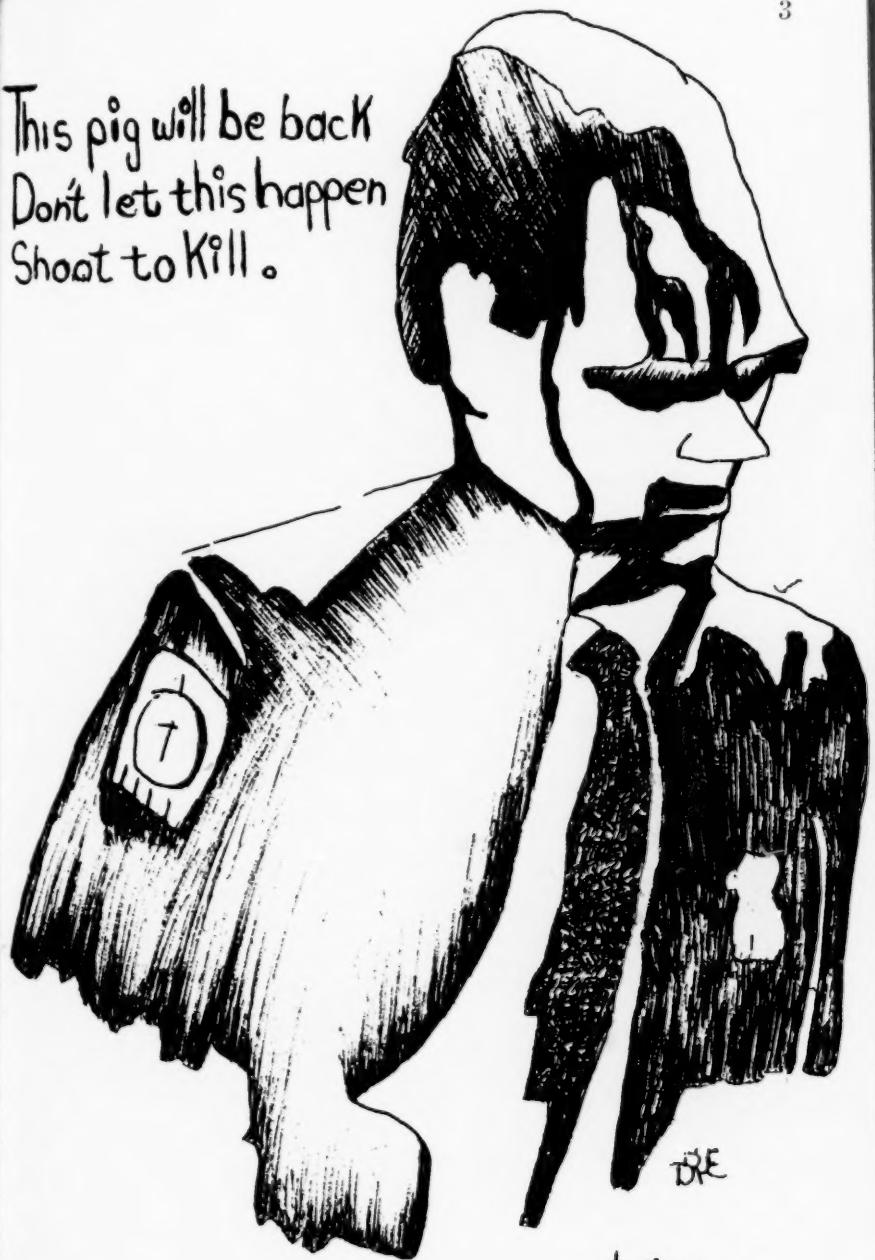
PAGE 6 THE BLACK PANTHER SATURDAY, NOVEMBER 2, 1974

WANTED DEAD FOR MURDER



S.F. PIG MICHAEL O'BRIEN
4785 - 18th. STREET
SAN FRANCISCO, CALIF.

This pig will be back
Don't let this happen
Shoot to Kill.



dexter bus @

*From the Desk
of the*



COMMANDER

WHEN THEY BURN OUR FLAG

....IT'S TIME FOR
VIOLENCE

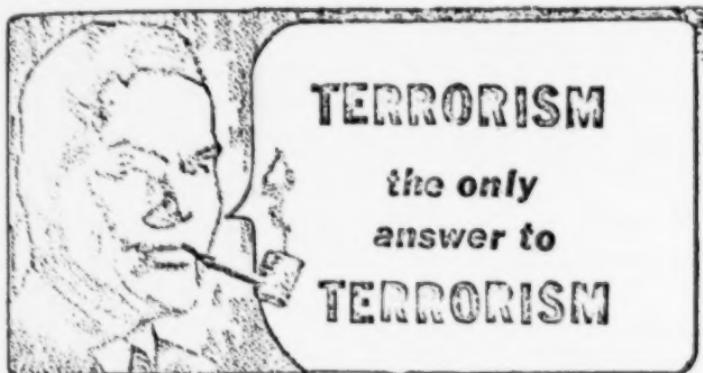
No nation in history which has tolerated disrespect for its flag and institutions has ever survived. Today, arrogant Communists, Jews, niggers and assorted degenerates, posing as lovers of "peace", are not only parading in our streets with enemy, Viet Cong flags, but openly burning our American flag.

As a young Navy fighter pilot out in the Pacific during World War II, at Guadalcanal, Guain, and other outposts, I remember the way I wept with deep emotion at the mere sight

of the stars and stripes being hoisted once more into the sky, after we fought for and won those islands.

How any American can now tolerate the arrogant traitors who hold that beautiful banner up and burn it in public, is more than I can understand!

This supine toleration of enemy flags in our streets, while they burn Old Glory, cannot be allowed much longer before the process becomes irreversible. If our people once lose the fire of love of country and intolerance of disrespect and treason toward that country, we will soon have



For the last 10 years, nigger nobs have been terrorizing White people. Niggers have been attacking our women in the streets, in subways, in offices--even in church. Our kids in school are shaken down by nigger bullies. Niggers tie up traffic. Niggers stop construction projects. Niggers block the doorways to businesses, urinate on restaurant tables and use their filthy language in front of our women and children. Now they're openly arming and drilling as private armies. The cover of Life magazine, recently, showed a herd of these black apes drilling in military formation.

The same crew of Black terrorists (the Black Panthers) invaded the California legislature with loaded shotguns, rifles and revolvers. They got away with it.

Once before in America during "reconstruction", these arrogant Blacks got too big for their breeches and terrorized the U. S. South.

The Whites took it only so long.

Then they rose up and STOPPED it.

They didn't stop it with petitions, talk, preaching or the Constitution.

They were being terrorized, not

talked about or written about.

They stopped it by SUPERIOR terror.

In those days, niggers were fresh from the jungles. Almost all of them believed in hants and voodoo.

So our grandaddies put on white sheets, hoods with eye-slits, and went out with rope, whip and gun. It scared the stupid Black animals out of their dim wits.

Within a matter of months, they had stopped the nigger attacks, bullying and rapes of Southern women.

But that was a hundred years ago.

Try putting on a sheet and marching down the main street of the nigger section of Detroit today. Or try the bed-sheet bit in the jig section of Watts, Southside Chicago, or any of the big city nigger-towns. A bed-sheet in Harlem is a JOKE.

AFTER the niggers finish laughing, they will tear off the sheets--and the arms and legs of the wearer.

Putting on a suit of knightly armor was great stuff, in the middle ages. But anybody who showed up with a suit of knight's armor in a

WHAT MUST WE DO NOW?

AN ARGUMENT FOR SABOTAGE AS THE NEXT LOGICAL STEP TOWARD OBSTRUCTION AND DISRUPTION OF THE U. S. WAR MACHINE

Old Assumptions Exposed

The history of the movement of opposition to the war in Vietnam is the history of the radicalization of an ever-increasing number of white middle-class Americans. These Americans have only recently come to understand clearly what American blacks and oppressed peoples abroad from Vietnam to South Africa, from Angola to Venezuela, have known for a much longer time: that the U.S. Government's rhetoric concerning freedom and democracy is merely a facade, a part of a desperate attempt to make oppression appear legitimate. Nowhere have the new middle-class radicals seen more clearly the degree to which they had formerly been mistaken about their government and the forces that control it, than in their early efforts to bring about a change in US policy in Vietnam.

They assumed, for example, that—even though Congress as would-be “representatives of the people” had acquiesced in the Administration’s use of the Gulf of Tonkin Resolution to circumvent Congress’ constitutional powers—public protest would both bring Congress to reclaim its prerogatives and show the Administration the speciousness and the brutal perverseness of its logic regarding Vietnam. These white middle-class Americans made the further assumption (completely justified, incidentally, by what every school child learns about the *theory* of American democracy) that our leaders—being decent and reasonable men—would be compelled by the overwhelming validity of the case presented by such public outcry and they would decide to end what obviously was and is a criminal intervention in Vietnam. The letters to Congressmen and to the President, the petitions, the vigils, and the picket lines were all based on the assumption by white middle-class Americans that our government works as we are told it works.

To be sure, there were radicals at the first SDS organized anti-Vietnam war protest in Washington in 1965, who thought of that demonstration in a way quite different from most of us (many of us believed it might cause those in power to re-examine their basic policy regarding Vietnam). These radicals knew that Americans had first to learn how their government works *in fact*, before they could come to realize the necessity of radical action to change it.

They saw demonstrations then and all subsequent demonstrations including the gigantic rally of April 15, 1967, as part of the vital processes of educating the rest of us to the de facto workings of Uncle Sam and of helping us to organize to decide on more meaningful ways of reversing America's present policy of opposition to struggles for national liberation.

Protest Answered By Escalation

The escalations in Vietnam from late 1965 right down to the stepped up bombing of the North after the massive April 15th rally have continually come in the face of and in spite of growing opposition to the war among every segment of American society. What was once considered a time-worn left-wing slur—that the American President and the Congress are answerable to a relatively small but powerful combination of business, industrial and military interests—has become all too painfully obvious to those of us who now consider ourselves radicals. At the same time that we have witnessed the irrelevancy of the old liberal civil rights movement to affect a fundamental change in the basic position of black Americans, the impact of our own powerlessness has crashed down upon us.

The radical polities of S.N.C.C. and of white groups like S.D.S.—though they are in a real sense very different—nevertheless show a common awareness that “the system” is not set up to allow radical change within itself and through its own mechanisms. The system is perfectly capable of co-opting a number of specific radical programs—as it did in destroying the radical movement during the 1930's—but it is incapable of changing itself. Meaningful change must come from without through grassroots organizations which challenge the legitimacy of, and ultimately the existence of, present political institutions.

Non-Violent Protest As An Organizing Tool

The passive, non-violent demonstrations against the Johnson Administration's war in Vietnam, as well as the silent vigils, the non-obstructive sit-ins, and other essentially white middle class forms of protest have—over the past three years—been important organizing tools. They continue to be important for the very simple reason that a great many basically non-political individuals—who find themselves dissatisfied with the Vietnam war and who are anxious to work to bring about U.S. withdrawal—will join a

picket line as a first step, but would never act if the only type of planned public protest risked a violent encounter with police, and arrest. That this is true is clear to every radical anti-war organizer in the country who is in tune with political reality, whether he is on or off campus. As our actions move "from protest to resistance" and from symbolic confrontation to obstruction, we must not neglect to keep open the possibilities of protest for the "not-yet-radical."

The Important Questions

Nevertheless it should remain clear to us that picket lines and marches will not bring about U.S. withdrawal from Vietnam. In retrospect, for example, the massive April 15th demonstration in New York was at best a radicalizing experience for its 300-400,000 participants and its sympathizers across the country. It showed many of them how completely unresponsive the Johnson Administration was, and is, to "liberal protest"; but otherwise it served only to soothe a few consciences: "Well, we've done what we could — guess it's hopeless."

In short, as far as radicals are concerned the important questions remain what they have always been: In our common struggle with the people of Vietnam to prevent the U.S. government from stifling their liberation movement, how do we make the cost for the U.S. to continue its aggression too high? How do we obstruct the system here at home to the point where continuing the war becomes too difficult, or even impossible?

Draft Resistance & Campus Confrontations

The answer of student radicals to the challenge of jamming the US war machine has centered upon two main areas: (1) draft resistance and (2) on-campus confrontations with military and war-industry recruiters. Both programs have been aimed at depriving the war machine (including holders of important defense contracts such as Dow) of young men.

It is far easier to measure the immediate results of the draft resistance program than the results of anti-military recruiter and anti-Dow-type confrontations. That is to say, we know approximately how many young men have refused induction. We know that more than 1000 young men publicly severed all connections with Selective Service by returning their draft cards on October

16th. These matters involve numerically representable "facts." On the other hand, we may never know what effect demonstrations against Dow have had in influencing students not to seek employment with Dow. Similarly there is no way by which we will ever be able to determine to what extent denying Army, Navy, Marine and Air Force recruiters access to some university campuses has made it more difficult for the military to meet its manpower needs.

The important point should be made, of course, that regardless of the extent to which demonstrations affect military or war industry recruiting on campuses, the demonstrations themselves serve as vital actions around which to develop radical campus programs for asserting the right of students to a major voice in deciding campus policies. This is an indisputable gain for the radical movement. This having been said, however, what assessment can we make of the campus anti-recruitment strategy at the beginning of 1968?

Davidson On Campus Confrontations

Carl Davidson, SDS interorganizational secretary, writing in the November 13th issue of *New Left Notes* made these observations on the direction of the evolving strategy of the campus confrontations:

. . . While the anti-recruiter sit-ins last Spring were primarily acts of moral witness and political protest, an increasing number of the sit-ins this Fall displayed the quality of Tactical Political Resistance. Their purpose was the disruption and obstruction of certain events and actions BY WHATEVER MEANS NECESSARY. Politically, the occurrence of this kind of activity implies the prior dissolution of whatever legitimacy and authority the institutions being resisted may have formerly had. This exceedingly important process of de sanctification points to the weakening of the existing institutions of power as well as the growing revolutionary potential of those forces opposing that power.

Davidson goes on to write:

. . . We saw the possibility of engaging in a common struggle with the liberation movements of the world by confronting the on-campus sector of the same military apparatus oppressing them. Our strategy became clear: the disruption, dislocation

and destruction of the military's access to the manpower intelligence, or resources of our universities. Our tactics: a varied series of local confrontations with campus military and para-military operations, hopefully escalating into student strikes, culminating in a national student strike, in the Spring of '68 against the military's presence on campus and against the war in Vietnam. This was by no means seen as our only program, even by the campus. But it was a major effort and experiment in a strategy of institutional resistance.

This analysis by Davidson is interesting and valuable in that it interprets the significance and direction of the revolutionary confrontations at the Universities of Wisconsin and Illinois, at Brooklyn, Oberlin and California State Colleges, and at other institutions. It gives some perspective to the opportunities for strengthening the radical movement at universities across the country.

Rhetoric and Reality

Nevertheless our thoughts must always return to Vietnam. Is this not where the most important war of liberation in progress today is taking place? What will a strong radical movement with even tens of thousands of militant activists have accomplished if it will have allowed the US government to have so decimated the country of Vietnam as to have succeeded in imposing a permanent military rule on that country in order to protect a string of military bases on the Asian mainland?

When Davidson writes, "we saw the possibility of engaging in a common struggle with the liberation movements of the world by confronting the on-campus sector of the same military apparatus oppressing them", this sounds very pretentious and shortsighted indeed. For in fact is it not transparently, even painfully, obvious that, even if students at *every* university in the United States prevented military and war industry representatives from recruiting on their campuses, this would not and could not materially affect the manpower procurement program of the Armed Forces? Recruiters would still interview many students off-campus and the Selective Service would still send its notices of induction. And, needless to say, we have not even mentioned the recruitment or the conscription of non-students. In short, the campus anti-recruiter campaign, while remaining a valuable tool for the radicalization of universities, cannot and will not affect the manpower supply of the US Army. For us to pretend that it may is nonsense.

Tactics Fit The Strategy, But . . .

It should be said about the anti-recruiter confrontations that they have been and will continue to be excellent examples of the success of a *strategy* (the denial to the military of direct access to university students and resources) when a commensurate and appropriate *tactic* (local confrontations, ranging in degree of militancy) is employed to implement the strategy. Radical campus organizers who adapt to their peculiar local situations can anticipate continuing success in their program to keep the war machine off campuses.

The trouble with the strategy of denying the military and the war industries access to campuses is that it is too limited, too narrow. The series of confrontations have been allowed to "succeed"—i.e., they have accomplished their immediate aims and have not been totally and summarily crushed by mass arrests and lengthy jail terms—primarily because they have *not* effectively interfered with the manpower procurement program of either the military or the war industries which recruit on campuses. The procurement programs of both can be effectively carried on off-campus. Thus, when Davidson speaks of the purpose of campus confrontations as being "the disruption and obstruction of certain events BY WHATEVER MEANS NECESSARY," the "certain events" (i.e., campus recruiting) are largely irrelevant to the US government's continued prosecution of the war *as it sees fit, for as long as it sees fit*.

A Correct Analysis

The induction center confrontations (of which the Pentagon was basically a large-scale variation) represent a perfectly correct analysis of the situation as regards military manpower procurement and its relation to the prosecution of the war. They demonstrate an awareness that the campus confrontations—however valuable—do not really cut sharply into the workings of Selective Service. Similarly they show a resignation to the fact that programs to encourage draft resistance—however valuable—when viewed realistically cannot hope to cut into the Army's manpower needs; their primary effect on the anti-war movement is to reduce its potency by sending its bravest and best to jail.

What the "induction center confrontation" recommends that we do about the situation is this: broaden the strategy of trying to disrupt the manpower procurement program by attempting to shut down the actual apparatus which inducts young men into the Army,

i.e., shut down the military induction centers. This, of course, is what Oakland was all about.

Right Strategy—Wrong Tactics

Nevertheless, although Oakland and New York City were successful confrontations for a number of other reasons, we learned from them that the weakness of the broadened *strategy* of induction center confrontation is that so far *tactics* have not kept pace with the new strategy. People at Oakland—fairly successfully for a time—and people in New York—not so successfully—tried to shut down their induction centers by transposing the same tactics that had reaped fairly satisfactory results on college campuses, to an entirely different situation. They somehow concluded that, because they had been allowed to keep Dow and the Marine Corps off their campuses with masses of unarmed people, they would be able to accomplish the much more significant task of actually stopping the army's induction of draftees and recruits by transporting the same crowds of unarmed, white middle-class people to city streets surrounding induction centers, facing police (armed to the teeth and with a free hand to make arrests), and then merely "obstructing."

Oakland and New York should have made it apparent to everyone by now that the authorities will not allow the broadened strategy to succeed as long as tactics leave those attempting to disrupt induction centers—or other arms of Selective Service or the military itself—so helpless and vulnerable. Mass arrests and stiffer penalties will insure that, as this type of campus-tactic-transported-downtown *appears* to begin to succeed (i.e., thousands of people assemble to close down induction centers) it will actually make its own success impossible, because it will invite mass arrests and fines and jail sentences which will have the counterproductive effect of crippling the anti-war movement in given localities for weeks or months at a time.

What *Do* We Do Now?

All this having been said and the movement having arrived where it presently "is at," there are likely to be two immediate responses to the obvious question: "Well then, what *do* we do now?"

First, a great many white middle-class people, who *think* they are radicals, are tempted to conclude that there is nothing left to

do; that all possible radical action has been tried in an effort to bring about US withdrawal—all to no avail; that the present level of disruption should simply be maintained—even though it be doomed to failure—in order to enable “responsible, liberal peace candidates” to move further left in 1968, while selling the electorate on a “moderate” label. In other words, “let’s be realistic” and see how the radical movement can aid a Kennedy or a McCarthy to get nominated and then elected on a moderate peace platform.

Secondly, many of us are tempted to abandon our cool and to throw ourselves into prison through suicide charges at induction centers with a desperate cry of moral outrage and frustration: “We know it’s hopeless, but goddamnit, we’ll die trying to stop this war.”

We Are Serious—Or We Are Not

These immediate responses are understandable in the sense that many of us are so totally frustrated at the apparent failure of our present tactics aimed at disruption, that we conclude that the whole strategy of disruption is hopeless. However, that such responses are understandable, excuses neither their shortsightedness nor the moral bankruptcy which they imply. Either we are still seriously and totally dedicated to aiding the Vietnamese war of national liberation, or we are not! If we are, we have a moral obligation to look beyond our present failings in order to formulate tactics which can realize a serious degree of disruption of the US war machine. If we are not—and we all suspect that (as in any movement) many are along just for the ride—then we should frankly admit that we favor liberal action and work openly through either of the two major parties or through a third party to get a “peace candidate” elected President. (For such people to get out of the radical movement could only help the movement.)

The tactics exemplified at Oakland and at New York, which were aimed at a strategy of *meaningful obstructions*—that is, for example, induction centers as opposed to campus recruiters—failed because they gave the government the choice as to whether or not it would *allow* masses of people to march down the street in broad daylight and to close down the centers. The government obviously would not agree to this. It was and is quite ready, quite willing, and quite able to disperse and/or arrest as many people as, realistically speaking, can be assembled at one induction center at a given time. (Even were this not the case, it is ludicrous to think that closing down one or two induction centers in the entire United

States for a matter of hours could really hurt the Selective Service's manpower program.) As we have said, this accomplishes little of lasting significance and is dangerous in that resultant stays in jail seriously deprive the movement of manpower and money.

One Man—One Induction Center

On the other hand, is there anyone who doubts that a small homemade incendiary device with a timing mechanism planted in a broom closet at the Oakland induction center could result in fire and smoke damage to the entire building, thus making it unusable for weeks or months? One person with a fair knowledge of chemistry could build such a device easily and cheaply and could plant it with almost no chance of being detected. Set to go off in the early morning hours (after 3:00 A.M. or so) such a device would do what the Oakland and New York demonstrations set out to do with several thousand people. It would not only close down the induction center—it would make the building itself useless for a period of weeks. There would, moreover, be no police violence and no mass arrests—but also no induction center.

For draft boards which are accessible (that is, not in the upper floors of modern concrete and steel buildings in the middle of large cities—but rather in small cities and towns) the same type delayed action incendiary device would work equally well. Timed for the early morning hours in order to confine damage to property, as opposed to employees (although small devices could be set off during board hours with little risk to individuals), an incendiary at a draft board would create havoc for days and weeks after. The workings of that board would be seriously disrupted. In instances where not all records are kept in steel file cabinets, documents of vital importance could be destroyed. The ultimate success in burning a local draft board would involve actual destruction of most, if not all, Selective Service files. This would shut down the induction process for that board until all men registered with the board could be re-registered.

Other Ways To Put The SS Out Of Business

Needless to say, action against induction centers and local boards should not be restricted to "big" actions (such as delayed action incendiary devices) or nothing. Especially in smaller towns and villages where many draft boards are relatively old frame structures and where police patrols are spotty, simple molotov cocktails

can be thrown through windows from side streets resulting in the same extensive damage witnessed in Newark and in Detroit, but without the arrests. Furthermore, simply continually breaking windows and strewing parking lots with broken glass and bent carpet tacks are relatively minor but effective methods of harassing Selective Service employees. Likewise, any of a number of minor actions directed against the automobiles of draft board members (such as slashing tires, breaking windows, etc.) can be effective parts of a pattern which, as it becomes widespread, will spell first inconvenience, later harassment, but finally fear for all Americans who continue to act as tools of the Selective Service System.

Already we can see two tactical foci for a successful strategy of obstructing the replenishing of US Army manpower: (1) Destruction of buildings and property which are used for the process of induction and (2) indirect harassment directed against property of individuals involved in Selective Service work, in hopes of discouraging some from continuing their employment with Selective Service.

Total Secrecy, Total Decentralization

Mentioned above are only a few very obvious examples of tactics for achieving the results we must achieve if our talk of aiding the Vietnamese people is not to degenerate into mere radical rhetoric or liberal style electioneering. Obviously, a bit of thinking would reveal a whole range of more violent, and also less-violent, tactics for destroying the property and harrassing the employees of Selective Service. What the radical movement needs now is a discussion regarding selection of targets and the anticipated effects of various tactics. This is not to say that this level of violent obstruction can be discussed publicly by organizations *as organizations*. Of course, it cannot. The success of such a program, which really *can* obstruct Selective Service, depends on total secrecy and total decentralization. At most a bare handful of people in a city here or in a community there should be aware of the actions of others in the same city or community. If someone is arrested for firebombing a local board in Boston, he cannot be brutalized by the police into revealing operations in New York, in Chicago, or in Sacramento. He simply doesn't know who those other individuals are. His only link with them is their link with him: the daily newspapers in which each anonymously reads and studies carefully the tactics and degree of success of the others. Similarly, all actions undertaken by individuals or by two's or three's should be entirely inde-

pendent of and separate from local radical groups (such as Resistance groups or SDS). That is to say, John X participates in SDS on campus, but never mentions his other activities against Selective Service to the membership of SDS. That he is protecting himself against arrest as well as keeping SDS "above-board" and aiming at an ever-stronger campus base, goes without saying.

Minimize Risks—Stay Out Of Jail

What about the possibility of arrests? What are the chances of arrest and the possible sentences for arson against a US government building, or even for slashing the tires of a member of a local draft board? These questions should be seriously faced by any individual or small groups of individuals which undertakes meaningful direct action to aid the Vietnamese people against US aggression. But just as one of the main practical considerations favoring tactics of sabotage (as opposed to the Oakland-type action) is the *lessened* chance of the movement being decimated by arrests, the ultimate success of a program of sabotage demands that no attempts be made as acts of desperation which run a high risk of arrest. Ultimate success demands that if a given action runs even a fair risk of arrest, that it *not be undertaken*. There are enough targets connected with Selective Service—draft boards, induction centers, recruiting booths—so that a period of "shopping around" will eventually lead to a vulnerable, "safe" target. (Other government agencies and war industries closely linked with the war effort provide additional targets.) The area is staked out for a period of days or weeks, the action is planned, materials are gathered, the target is hit—that's all. Only one person—or at most two or three people—knows of the action. There is no giant web of conspirators to spring leaks. There are, hopefully, no romantic kids involved who have to blabber to some pal or girl friend, "Gee, I just started a gasoline fire through the basement window of a draft board." Individuals who will be committed to this type of direct obstruction of the military will not be glory-seeking idealists. They will most likely be (if they are to be successful) highly motivated, meticulously calculating, and thoroughly dedicated men and women who have analyzed "the dilemma" at the beginning of 1968, and have concluded that this is what has to be done. They will be ordinary students, professors, community workers, nine-to-five office workers, teachers, etc., who lead "normal" lives and who carry on "normal" public and private relationships, but who (perhaps at intervals of 3 to 5 months) will destroy property of Selective Service or will engage in some form of harrassment of its employees. They will

take no great risks—they would rather wait and watch for a chance. They will understand only too well that if their actions and the actions of others like them across the country are to succeed in making recruitment of imperialist forces more difficult, must not be arrested. They must not make mistakes. They must remain *out of jail* in order to be able to strike again and again.

This pamphlet was prepared in Toronto, Canada. It has been distributed to 327 anti-Vietnam war groups across the United States.

Incendiary Time Bomb (Diagram omitted)

A cardboard or iron tube is filled with a mixture consisting of Potassium Chlorate and $\frac{1}{4}$ sugar and is sealed. A glass vial is filled with sulphuric acid and stoppered with paper. To arm the bomb insert the vial, stoppered end down, into the tube. The acid will eat through the paper and ignite the potassium chlorate-sugar mixture.

A good deal of experimentation with small models of this bomb should be carried out to determine how long it takes for the sulphuric acid to eat through various types of stoppers. In this way it will be possible to estimate (to within an hour or two) when a given incendiary bomb will ignite. (In a given building it is wise to place the device near combustible materials, such as paper, etc.)

A WARNING: The $KClO_3$ used as an oxidizer in this incendiary bomb tends to decompose quite easily and to yield its oxygen to any fuels with which it is mixed. This in turn may result in an unexpected, uncontrolled detonation. Therefore, experiment first with small quantities and familiarize yourself with the reaction, before attempting to build a larger bomb that will give off a flame hot enough to start a major fire when placed near combustible materials in a building.

Molotov Cocktail (Diagram omitted)

A bottle (any type of bottle) is filled with $\frac{2}{3}$ gasoline and $\frac{1}{3}$ oil. A fuse (even a rag-type fuse will work) is inserted into the bottle so that it reaches from the bottom of the bottle out through its neck. The bottle is stoppered with cork, paper, or fabric. The fuse is lit and, after it begins to burn, the bottle is thrown against the

object which is intended to burn. On breaking, the bottle sprays the gasoline and oil on the objective and the fuse ignites it. The ensuing large flame and small explosion will not endanger the thrower, even though he is close to it. The bottle with its lighted fuse NEVER EXPLODES! This point is stressed to insure the thrower that he is never in any danger.

Recommended: Practice with a bottle filled with water, lighting the fuse as though it really contained gasoline. Practice throwing such bottles to develop confidence and accuracy.

In an actual attack on a building, it might be wise to first smash with a brick a window of the room to be hit, then to throw a very fragile bottle through the resulting hole to insure that the bottle shatters inside the building. As soon as the firebomb explodes inside the building, several other fragile bottles of gasoline and oil can be quickly tossed in to feed the flames and to make the fire hotter, thus insuring major damage. Of course, one must know in advance that there is something in the room which will catch fire and burn.

AS ALWAYS: Do not attempt this type of action in areas or at times where one can be easily spotted and arrested. Study the set-ups in several different towns for months if necessary, before taking an action. Remember, *we're no good to anyone in jail*. We must do this again and again until it begins to really hurt Selective Service or until the government is forced to station guards on 24-hour duty around all draft board offices, induction centers, and recruiting offices and booths.

To Set A Simple Fire

(Diagram omitted)

A lighted cigarette is placed in a book of matches and left on combustible material.

To Sabotage Automobile Tires

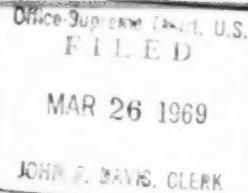
(Diagram omitted)

Spread nails, tacks, etc. on SS parking lots or parking areas at night. Also around tires of members of draft boards. All nails and tacks should be painted black so as not to reflect light, thus making them difficult to spot until *after* a flat.

To Sabotage Automobile Gas Lines

Pour a little water or sugar into gas tanks.

FILE COPY



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~3~~ #2

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 163

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., JIM DAN, DIANE HIRSCH,

AND FARREL BROSLAWSKY,

Appellees.

BRIEF FOR APPELLEES

Opinion Below

The Opinion of the District Court (R. 18-38) was rendered on March 1, 1968, and is reported at 281 F.Supp. 507.

Jurisdiction

The preliminary injunction issued by the District Court was entered on March 11, 1968 (R. 16-17). Notice of appeal from the aforesaid preliminary injunction (R. 39-40) was filed on April 9, 1968. The appeal was docketed June 6, 1968, and probable jurisdiction was noted on January 13, 1969. The jurisdiction of this Court is invoked under 28 USC 1253.

Questions Presented

1. Whether the District Court correctly held that §§11400-11402 of the California Penal Code (Criminal Syndicalism) are facially unconstitutional, in violation of the First and Fourteenth Amendments.
2. Whether under the Supremacy clause (Article VI, Section 2) the California Criminal Syndicalism Law has been superseded and preempted by federal legislation.¹

Constitutional Provisions and Statutes Involved

The provisions of California Penal Code §§11400, 11401 and 11402; 18 USC 2385, 28 USC 2283 and 42 USC 1983 are set forth in the brief for the appellant (Br. 3-6). The following pertinent constitutional and statutory provisions are also involved.

1. The First Amendment provides in part:

“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people

¹ In his notice of appeal, appellant presented only two questions: whether the decision of this Court in *Whitney v. California*, 274 U.S. 357 was binding upon the District Court, and whether the California Criminal Syndicalism Law was unconstitutional on its face (R. 40). Appellant's jurisdictional statement was limited to the same two questions (Jurisd. St. 4). Following the docketing of the appeal and after a motion to affirm had been made by appellees, the Attorney General of the State of California, at the request of this Court, filed a brief and for the first time presented questions involving 28 USC 2283, and the standing of some of the appellees to raise the constitutional questions (Brief 2).

At no time in the proceedings before the District Court below did the appellant ever raise the issue of 28 USC 2283 or the standings of the parties.

peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment provides in part:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Supremacy clause, Article VI, cl. 2, provides as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. 28 USC 1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Statement

The complaint in the case herein (R. 2-9) was filed on July 21, 1967 (R. 1). The appellees invoked the jurisdiction of the District Court under 28 USC 1331; 42 USC 1983; 28 USC 1343(3); and 28 USC 2281 and 2284 (R. 2). The appellees are all citizens of the State of California and of the United States. Appellees Dan and Hirsch are members of the Progressive Labor Party, an organization which advocates the replacement of capitalism by socialism, ownership of the means of production by the working people of the country, the abolition of the profit system, and the creation of political institutions organized and operated by and in behalf of the overwhelming majority of the people in the nation (R. 3). Appellee Broslawsky is an instructor in history at Los Angeles Valley College (R. 3). The appellant is the District Attorney of the County of Los Angeles, State of California (R. 3).

The complaint set forth the provisions of California Penal Code §§11400-11401, referred to as the California Criminal Syndicalism Act (R. 3-4, 8-9). The complaint alleged that the provisions of the statutes, on their face, are void and illegal in violation of the provisions of the First and Fourteenth Amendments. It was alleged that the provisions of the California Criminal Syndicalism Act violate the fundamental guarantees of free speech, press, assembly, and the right to petition the government for redress of grievances; that the provisions operate as a prior restraint

upon freedom of expression and the circulation of the press; that they violate the guarantee of due process of law in that the statutes are so vague and indefinite as to fail to meet the requirement of certainty in criminal statutes; and that they invade areas preempted by laws of the United States and, therefore, violate the Supremacy clause, Article VI, Section 2, of the Constitution (R. 4).

The complaint further alleged that appellee Harris had been charged with and subjected to indictment for violation of the California Criminal Syndicalism Act, for distributing and circulating leaflets bearing the imprint of the Progressive Labor Party; that by reason of said prosecution and the presence of said Act, appellee Harris was inhibited in the exercise of his First Amendment rights; that appellees Dan and Hirsch, by reasons of the presence of the Act and the prosecution of appellee Harris, felt inhibited in attempting through peaceful, non-violent means to advocate the program of the Progressive Labor Party which advocates doctrines and precepts seeking change in industrial ownership and control and effecting political change; and that appellee Broslawsky as an instructor of history, by reason of the presence of the Act and the prosecution of appellee Harris, felt inhibited and uncertain as to what he might say and teach since the said appellee teaches about the doctrines of Karl Marx and reads from the Communist Manifesto and other revolutionary works as part of his class work (R. 4-5). The appellees alleged that they were and continue to be subjected to irreparable injury and deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States (R. 5-6).

The complaint also alleged that prior to filing of the complaint, appellee Harris had moved in the state court to dismiss the indictment against him on the ground of the unconstitutionality of the said Criminal Syndicalism Act under the United States Constitution; that said motion had been denied by the Superior Court; that appellee had then timely filed a petition for writ of prohibition in the appropriate intermediate appellate court upon the ground of the unconstitutionality of the Act; that said petition was denied without opinion; and that the California Supreme Court thereafter denied a hearing (R. 6). The prayer of the complaint was for the convocation of a three-judge federal court, for the granting of a preliminary and permanent injunction against the enforcement of the said provisions of the California Penal Code, and for such other and further relief as to the court seemed proper (R. 7-8).

On August 8, 1967, a temporary restraining order was granted by the Honorable William P. Gray, a Judge of the United States District Court for the Central District of California (R. 10-12). Thereafter, a three-judge federal court composed of Circuit Judge Jertberg and District Judges Gray and Ferguson was convened (R. 13-15). Thereupon, the appellant moved to dismiss the complaint and the cause came on for hearing on the appellees' motion for a preliminary injunction and upon appellant's motion to dismiss (R. 1). On March 11, 1968, the District Court rendered its unanimous decision (R. 18-38).

On the duty of the court to resolve the basic constitutional questions presented by the complaint and the motion to dismiss, the District Court pointed initially to the fact that proceedings had been initiated in all the State Courts of California, seeking a ruling on the constitutional validity

of the Act prior to recourse to the Federal Courts (R. 21). In view of this state of the record, and in light of the decisions in *Dombrowski v. Pfister*, 380 U.S. 479 and *Zwickler v. Koota*, 389 U.S. 241, the Court held that abstention would be inappropriate if the California Criminal Syndicalism Act unconstitutionally abridged free expression (R. 22-23).

With respect to appellant's "principal contention" (R. 24), the District Court held that it did not feel itself bound by the decision in *Whitney v. California*, 274 U.S. 357. The Court held that subsequent decisions, such as *N.A.A.C.P. v. Button*, 371 U.S. 415, and *Baggett v. Bullitt*, 377 U.S. 360, pointed to the need for determination as to whether the Act was impermissibly vague and overbroad (R. 24-26). The Court held that in the light of First Amendment requirements and Supreme Court rulings, it was necessary to consider the statute as a whole, irrespective of its limited applicability to the parties challenging it, and irrespective of whether a statute might be drawn with narrow specificity to apply to such parties (R. 26-27).

Turning to the provisions themselves, the Court's analysis plainly established that the provisions of each of the sections of the California Criminal Syndicalism Act were, on their face, unduly vague, ambiguous and overbroad and, therefore, in violation of the guarantees of the First and Fourteenth Amendments (R. 27-36).

Finally, the District Court held that the declaration that the Act was unconstitutional on its face was all of the relief that was probably necessary to be accorded to appellees, since it was assumed that as long as the decision stood, the appellant would refrain from further prosecutions under the Act (R. 38). However, out of concern that to

withhold injunctive relief might deprive appellant of the right to appeal under 28 USC 1253, it was decided that a temporary injunction would issue by separate order (R. 38). On March 11, 1968, therefore, a preliminary injunction was filed by the District Court, enjoining and restraining any further prosecution of the pending criminal action against appellee Harris (R. 16-17). The notice of appeal by appellant followed on April 9, 1968 (R. 39-40).²

ARGUMENT

Summary of Argument

1. The California Criminal Syndicalism Act abridges freedoms of speech and press, assembly and association, and the right to petition for a redress of grievances. The provisions of the Act are uncertain and overbroad and constitute a prior restraint upon and a deterrent to the exercise of First Amendment freedoms.

A portion of Appellant's Brief appears to be an appeal to political expediency, with emphasis placed upon imma-

² The appellant has included in his "Statement" certain matters which are no part of the record (Br. 6-7). The extraneous references are inaccurate and a distortion of the facts. The two-count indictment returned against appellee Harris was merely in statutory language and each count included a copy of the leaflet which appellee Harris allegedly distributed. The so-called "Watts riot" preceded by many months the date of the distribution of the two leaflets as alleged in the indictment, and the distribution did not occur in the black community in Watts, but at the Civic Center, where no "tensions generated" by the alleged riot were in evidence. The indictment returned against appellee Harris did not allege "the social context or matrix of his action" (Br. 8) or "whether there was in fact a clear and present danger of violence or terrorism" (Br. 8).

terial and incompetent documents and unsubstantiated statements of alleged fact, unrelated to the record in this case. Such an appeal is wholly inappropriate in a judicial proceeding.

The real significance of appellant's presentation is that the State proposes that the California Criminal Syndicalism Act be upheld despite its plain invalidity, and that the right to advocate, teach, print and publish, and organize be sacrificed to governmental control in the interest of what the State considers to be desirable public policy. The Act is a "speech" statute and not a conduct statute. The Act cannot be supported as a means of dealing with unlawful conduct or speech brigaded with unlawful conduct. California is protected with a plenitude of existing criminal legislation for that purpose.

2. There is no serious dispute that the provisions of the California Criminal Syndicalism Act are facially unconstitutional. It is plain that the decisions of this Court since *Whitney* have so interpreted the provisions of the First Amendment as to render such statutes as the California Criminal Syndicalism Act clearly unconstitutional.

The appellant argues that the California Act, as construed by the California courts in the past, is constitutional. However, a cursory review of the California decisions from 1919 to 1955, the last time the Act was referred to, indicates that appellant is mistaken. The Act has been constantly construed to punish advocacy of abstract doctrine, to punish the exercise of freedoms of association and assembly, and acts or conduct which clearly constitute no more than guiltless behavior.

Appellant does not argue that the District Court should have abstained from passing upon the constitutionality of the Act, but he contents himself with urging that the District Court should have construed the statute to save it from unconstitutional infirmity. It is urged that the *Dennis* gloss should have been placed upon the statute by the District Court.

The argument that the District Court should have construed the state statute to save it from constitutional attack is without merit. The District Court could not appropriately make such a construction, and it is doubtful that *Dennis* can be resorted to in the light of the subsequent decision of this Court in *Keyishian*. Moreover, such laws as the Criminal Syndicalism Act are so pervasively censorial and so patently restrictive of the exercise of First Amendment freedoms that no construction would remove the uncertainty and overbreadth of the law. The deterrent to the exercise of First Amendment freedoms would still exist.

It must not be overlooked in this case that the state courts were requested to pass upon the constitutionality of the California Criminal Syndicalism Act and declined to do so. The District Court was therefore bound to pass upon the constitutional claims presented by appellees and, having done so, the District Court had no other recourse but to declare the Act patently unconstitutional.

3. Appellant urges that some of the appellees did not have standing to attack the validity of the statute, and that the District Court was without jurisdiction to afford such appellees declaratory relief. The appellant appears to overlook the fact that the complaint urged that these appellees,

as members of a political party, and as a teacher, were advocating and teaching doctrines which appellees felt inhibited in advocating and teaching because of the presence of the statute and the prosecution of one of the appellees under the Act. Appellant's motion to dismiss the complaint accepted these allegations as true.

Appellant argues that the particular appellees stood in no danger of prosecution and therefore no "controversy" was presented. However, the complaint prayed not only for an injunction but for a declaratory judgment that the Act was unconstitutional on its face. This Court emphasized in *Dombrowski* that persons were not required to risk prosecution to test overbroad statutes, and that so long as such statutes remain available to the State the threat of prosecutions of protected expression is a real and substantial one. The decisions of this Court as well as the lower courts are opposed to appellant's position.

4. The Act has been superseded and preempted by Congressional legislation. The field of sedition has been pervasively occupied by Congressional legislation such as the Smith Act, the Internal Security Act, the Communist Control Act and other Congressional measures.

In the light of the decision of this Court in *Nelson*, state sedition, criminal anarchy and criminal syndicalism statutes appear plainly superseded. *Uphaus* reaffirmed *Nelson*; it did not overrule *Nelson*.

5. 28 U.S.C. 2283 does not bar the grant of injunctive relief under 42 U.S.C. 1983. This issue was not raised by appellant before the District Court, nor in his Jurisdictional Statement. Appellant's position is, in any event, untenable.

Section 2283 does not involve the jurisdiction of the Court, and does not prohibit in all cases injunctions staying proceedings in a state court. It is not a question of jurisdiction, but a question of comity which appellant is essentially invoking. However, we are dealing here with a state statute which is clearly unconstitutional; a statute which by its very presence acts as a serious restriction upon the exercise of basic freedoms. The language of the statute is extremely broad and vague and uncertain. It is against the enforcement of this statute that appellee Harris sought the protection of a Federal Court. The appellee sought the protection of Federal rights in a Federal forum, and a Federal Court was without power to deny him relief.

Appellees submit that the injunctive relief granted below was "expressly authorized by Act of Congress". Not only do law and history support the grant of injunctive relief in §1983 actions under the circumstances herein but, in any event, it is submitted that prosecutions under statutes which are so clearly unconstitutional on their face as the California Criminal Syndicalism Act should be enjoined by a Federal Court if the Constitution and laws of the United States are to be maintained in our Federal System.

I.

The Provisions of California Penal Code §§11400-11402, the California Criminal Syndicalism Act, Are Unconstitutional on Their Face. The Act Abridges Freedoms of Speech and Press and the Right of the People Peaceably to Assemble and to Petition the Government for a Redress of Grievances. The Vagueness, Ambiguity and Overbreadth of the Language of the Act Constitute a Prior Restraint Upon, and a Deterrent to, the Exercise of Such Freedoms. The Act Clearly Violates the Provisions of the First Amendment Subsumed Into the Due Process Clause of the Fourteenth Amendment as a Limitation on State Action.

On this issue, the appellant has divided its brief into two segments, marked respectively, "A. Background" and "B. The California Criminal Syndicalism Act, as construed by our state courts, is not unconstitutionally vague or overbroad" (Br. 15-26). The appellant also includes certain exhibits as an appendix to its brief in connection with its discussion under subdivision "A" (Br. 1-19).

A. Appellant's discussion under "A" has, of course, no relation to the record in the case herein. It is frankly and avowedly an appeal to political expediency. As against such a similar request to make the courts the effective instruments of arbitrary suppression at the behest of executive officers of the State, a learned judge once stated: ". . . However hard and disagreeable may be the task in times of popular passion and excitement it is the duty of the courts to set their faces like flint against this erosive subversion of the judicial process". *Bridges v. United States*, 184 F.2d 881, 887 (9 Cir. 1950), opinion by Healey, J.

Reliance by appellant upon incompetent, unauthenticated documents and irrelevant, immaterial and unsubstantiated statements of alleged fact, wholly unrelated to the record in this case in either the state or federal courts, is a mark of the weakness of appellant's substantive positions in these proceedings. Indeed, it is curious that although appellant has chosen to append to its brief purported pamphlets and documents allegedly issued by "apostles of violence", the appellant has not seen fit to set forth the two leaflets which the indictment in this case charged appellee Harris with distributing. The point is that appellant overlooks the fact that these are judicial proceedings where the rights of persons under the Constitution must be decided by due process of law. These are not legislative inquiries where frenetic and extreme appeals by executive officers unhappily receive a more attentive ear.

The real significance of the unseemly presentation under "A" of appellant's brief is the light thrown upon the construction of the California Criminal Syndicalism Act by representatives of the State. It is plain that the State is attempting to defend and maintain the Criminal Syndicalism Act intact. The rights to "advocate", or "teach", or "justify", or "print", or "publish", or "edit", or "issue", or "circulate", or "publicly display" or "organize", or "become a member" are to be sacrificed to governmental control in the interest of what the State considers to be desirable public policy. It is not unlawful conduct which is the thrust of appellant's hysterical appeal, but it is "literature" which allegedly "reinforces the distorted perceptions of sick minds" and "speech" which is "quite literally, a lethal weapon" (Br. 14).

There is no basis for, and no merit to, appellant's contention that the Act is necessary to deal with violent action or incitement to action. In the first place, the statute is a "speech" statute, not a conduct statute. In the second place, appellant's extraneous discussions and attached exhibits make it perfectly clear that the statute is intended to be used against persons as a means of suppressing speech, press, assembly, and the right to petition for redress of grievances. In the third place, the Act cannot be supported as a means of dealing with unlawful conduct or speech brigaded with unlawful conduct. California is protected with a plenitude of existing criminal legislation.³ The point

³ See, California Penal Code §§69 (obstructing or resisting executive officers in performance of their duties, attempts, threats, violence); 148 (resisting, delaying or obstructing an officer); 148.2 (illegal conduct at burning of building); 182 (conspiracy); 187-190.1 (murder); 192-193 (manslaughter); 203-204 (mayhem); 207-210 (kidnapping); 211-213 (robbery); 214 (train robbery); 216 (administering poison); 217 (assault with intent to commit murder); 217.1 (assault or attempt to kill executive or judicial officers); 218-219 (train wrecking); 219.1-219.3 (throwing missiles and hard substances at trains and common carriers); 220 (assault with intent to commit rape, sodomy, mayhem, robbery or grand larceny); 221 (assault with intent to commit other felony); 240-243 (assault and battery); 244 (assault with caustic chemicals); 245 (assault with deadly weapon); 246 (shooting at inhabited dwelling or occupied building); 375 (places of public assembly; injurious, nauseous, or offensive substance); 403 (disturbance of public assembly or meeting); 404-405 (riot and incitement to riot); 407-409 (unlawful assembly, remaining present after warning to disperse); 415 (disturbing the peace); 416 (assembly for purpose of disturbing peace or committing unlawful act, refusal to disperse); 417 (drawing, exhibiting or using firearm or deadly weapon); 447a-449c (burning of private buildings, personal property, trailer coaches, bridges, crops, etc.); 451a (attempts to burn, acts preliminary or in furtherance thereof); 452 (possession of flammable, explosive or combustible material or substance, or device; possession, manufacture or disposal of fire bomb); 454 (violation of arson statutes during insurrection, state of disaster or extreme emergency); 467 (deadly weapons, possession with intent to assault); 468 (sniperscope, unlawful possession); 518-520 (extortion); 587-593c (malicious in-

is that the Criminal Syndicalism Law is not directed against those who commit or actually plan violence, but against those who express or hold opinions deemed objectionable or distasteful by the State.

B. 1. Appellant does not seriously question the thesis that the provisions of the California Criminal Syndicalism Act are unconstitutional on their face. Appellant agrees that the District Court was "obliged to consider anew the precise claims raised in *Whitney*" [Br. 15]. Having made this concession, it appears plain, it is submitted, that the decisions of this Court since *Whitney* have so interpreted the provisions of the First Amendment as to render such statutes as the California Criminal Syndicalism Act plainly unconstitutional. *United States v. Robel*,

juries to railroad bridges, highways, bridges and telegraphs); 602 (trespasses constituting misdemeanors); 602.5 (unauthorized entry of property); 602.7 (refusal to leave state college or university property); 602.9 (disruptive presence at schools); 603 (forcible entry, vandalism); 622 (injuring works of art or improvements in municipalities); 624 (injuries to waterworks, facilities or pipes); 647 (disorderly conduct); 647a (vagrancy, child molestation); 647b (loitering about adult schools, pupil molestation); 647c (obstruction of street, sidewalk, or other place open to public); 650 1/2 (injuring person or property, disturbing or endangering peace or health); 653g (loitering about schools or public places); 653k (switch-blade knife, carrying, sale or disposition); 659 (misdemeanor concealing or aiding); 663-665 (attempts); 723-727 (suppression of riots); 830-830.6 (definition of peace officers); 833 (possession of dangerous weapons, right of peace officers to search and seize); 834a (resistance to arrest by a peace officer); 835-835a (use of force to effect arrest); 863 (peace officers, arrest with or without warrant); 4600 (demolishing prisons or jails); 12001-12002 (pistols, revolvers and firearms capable of being concealed); 12020-12031 (blackjacks, concealed explosive or dagger, arms in holsters or sheaths, loaded firearms, etc.); 12200-12220 (unlawful possession of machine guns); 12301-12307 (destructive devices); 12400-12420 (shells, cartridges, bombs and tear gas); 12520 (fire-arm silencers).

389 U.S. 258; *Zwickler v. Koota*, 389 U.S. 241; *Keyishian v. Bd. of Regents*, 385 U.S. 589; *Bond v. Floyd*, 385 U.S. 116; *Garrison v. Louisiana*, 379 U.S. 64; *New York Times Co. v. Sullivan*, 376 U.S. 254; *Wood v. Georgia*, 370 U.S. 375; *Terminiello v. Chicago*, 337 U.S. 1; *Thornhill v. Alabama*, 310 U.S. 88; *Herndon v. Lowry*, 301 U.S. 242; *De-Jonge v. Oregon*, 299 U.S. 353.

The provisions of the California Criminal Syndicalism Act necessarily curtail activities which are privileged under the First Amendment. The very presence of such a law imposes a substantial burden on protected activities of speech, press, assembly, association and the right to petition for redress of grievances. Criminal syndicalism laws are so patently in conflict with constitutional guarantees that three-judge Federal Courts not only in California but in Mississippi, Georgia and Kentucky have not hesitated to strike down such statutes and enjoin prosecutions and enforcement of such law. See, *Ware v. Nichols*, 266 F. Supp. 564 (D.C. Miss. 1967); *Carmichael v. Allen*, 267 F. Supp. 985 (D.C. Ga. 1967); *Baker v. Bindner*, 274 F.Supp. 658 (D.C. Ky. 1967); *McSurely v. Ratliff*, 282 F.Supp. 848 (D.C. Ky. 1967). See also, *Aelony v. Pace*, 32 U.S. Law Week 2215, 8 Race Relations Law Rptr. 1355 [ND Ga. 1963, a three-judge court, not otherwise reported]. Discussing the Kentucky criminal syndicalism law, the Court in *McSurely* stated: "It is difficult to believe that capable lawyers could seriously contend that this statute is constitutional" (282 F.Supp. at 852).

2. The essence of appellant's argument is that the California Criminal Syndicalism Act, "construed by our state courts", is constitutional [Br. 15-26]. In this respect appellant is clearly in error as even a cursory review of the

decisions of the California courts with respect to the construction and application of the Criminal Syndicalism Act is concerned. Both the earlier and later state cases patently fail to meet the standards and criteria enunciated by this Court in judging the validity of statutes which affect the exercise of First Amendment freedoms. See also, Dowell, "A History of Criminal Syndicalism Legislation in the United States" in LVII John Hopkins University Studies in Historical and Political Science, 1-176 (1939); Chafee, *Free Speech in the United States*, Ch. 10, 326-354 (1941).

In 1919, shortly after the passage of the Criminal Syndicalism Act, the Supreme Court of California declared that the statute on its face was valid without any extended discussion. *Ex Parte McDermott*, 180 Cal. 783, 183 Pac. 437 (1919). In *People v. Malley*, 49 Cal.App. 597, 194 P. 48 (1920), the District Court of Appeal upheld a judgment of conviction under subd. 3 of §2 of the Act prescribing punishment for circulation or display of any book or written or printed matter advocating, teaching, aiding, abetting or advising criminal syndicalism. An indictment following substantially the language of the statute and without specifying the particular books or material involved was held sufficient. The pamphlets and printed matter displayed and exposed for sale at the headquarters of a branch of the IWW were held sufficient to support a conviction under the statute. Since the record showed that the defendant distributed some of the literature under his control "with full understanding of its nature", the Court held that this was sufficient to attribute to defendant an intent to bring about "all such consequences as might reasonably be anticipated from its distribution" (194 Pac. at 54). Cf., *Fiske v. Kansas*, 274 U.S. 380; *Hartzel v.*

United States, 322 U.S. 680; *Baggett v. Bullitt*, 377 U.S. 360; *Elfbrandt v. Russell*, 384 U.S. 11; *Garrison v. Louisiana*, 379 U.S. 64.

In *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921), the California Supreme Court upheld the Criminal Syndicalism Act as constitutional, against claims that the provisions of the law were uncertain. The Court noted that the language of the statute was "unusually broad and comprehensive, as well as tautological" (203 Pac. at 80). Mere membership in the IWW was held sufficient to justify the conviction under subd. 4 of §2 of the Act. In *People v. Taylor*, 187 Cal. 378, 203 Pac. 85 (1921), the California Supreme Court, contrary to *Malley*, held that an indictment under subd. 3 could not be couched in the language of the statute because "each separate act and publication would constitute separate and distinct violations of the statute" (203 Pac. at 90). The statute was otherwise held constitutional and a conviction based on membership in the Communist Labor Party was upheld. Cf., *Wieman v. Updegraff*, 344 U.S. 183; *Elfbrandt v. Russell*, 384 U.S. 11; *Keyishian v. Bd. of Regents*, 384 U.S. 589.

In *People v. Wieler*, 55 Cal.App. 687, 204 Pac. 410 (1922), a judgment of conviction was upheld under subd. 3 of §2, when it was shown that defendant "had justified the tactics of the IWW" by calling for the "release of each and every one now serving a sentence as a political or class war prisoner" (204 Pac. at 412-413). In *People v. Roe*, 58 Cal.App. 690, 209 Pac. 381 (1922), a judgment of conviction for membership in the IWW was affirmed on the theory that the defendant knew "that said organization advocated and taught criminal syndicalism" (209 Pac. at 387).

In *People v. Cox*, 66 Cal.App. 287, 226 Pac. 14 (1924), convictions for membership in the IWW were affirmed. "The usual constitutional objections to the Act in question" were rejected (226 Pac. at 15). "Knowing" membership was held to apply "to one who voluntarily and by action on his part has become and is a member of such an organization. Under such circumstances knowledge is imputed. . . ." (226 Pac. at 16). In *Ex Parte Wood*, 194 Cal. 49, 227 Pac. 908 (1924), habeas corpus was denied to one imprisoned for contempt of court because of violation of an injunction obtained by the Attorney General of the State preventing all of the acts forbidden by the Criminal Syndicalism Act. Procuring new members of the IWW was held to be a violation of the injunction justifying the punishment in contempt. In *People v. Thompson*, 68 Cal.App. 487, 229 Pac. 896 (1924), "the criminal character of the IWW" was held sufficient to justify the jury in drawing an inference of guilty knowledge by defendants shown to be members of the organization (229 Pac. at 898). In *People v. Stewart*, 68 Cal.App. 621, 230 Pac. 221 (1924), the fact that defendants did not themselves believe in violence did not constitute a defense when the alleged guilty character of the IWW and defendants' membership were shown.

In *People v. McClenngen*, 195 Cal. 445, 234 Pac. 91 (1925), the conviction of 26 defendants jointly accused of violating the Criminal Syndicalism Act was upheld. The Supreme Court once again upheld the constitutionality of the statute, holding that if the record showed that defendants were and remained members of the IWW, and the IWW was shown to be an unlawful organization then the convictions were proper. The Supreme Court, on the is-

sue of knowledge and scienter, made the following statement: "*A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization*" (234 Pac. at 101) (emphasis added).

In 1931, in *People v. Horiuchi*, 114 Cal.App. 415, 300 Pac. 457 (1931), the Syndicalism Act was held properly applied to the Communist Party and its members. The charge in essence was the publication, issuance, circulation and public display of various books, papers, pamphlets, documents, including such things as "advocating unlawful picketing of sheds and fields in the Imperial County" (300 Pac. at 462).

In *People v. Chambers*, 22 Cal.App.2d 687, 72 Pac.2d 746 (1937), the Court held that the California Syndicalism Act was not unconstitutional, relying upon *Whitney* and *McClennean* (72 Pac.2d at 751). Judgments of conviction however were reversed on procedural grounds not relevant here.

In *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 Pac.2d 885 (1946), a provision of the California Education Code, known as the Civic Center Act, authorized school boards to require execution of affidavits to aid in determining whether any person or organization applying for use of school property was a subversive element. An affiliate of the American Civil Liberties Union made application to a school board for use of a school auditorium and was granted the use upon condition that the organization execute a patently unconstitutional loyalty oath. The California Supreme Court struck down so much of the Education Code as authorized such procedure. The

school board, in justifying its action, among other things, argued that it was attempting to supplement the California Syndicalism Act. In dismissing this argument, the California Supreme Court stated that the Act was constitutional, but could only be applied when there was imminent danger that advocacy of the prohibited doctrines would give rise to evils that the State might prevent (171 Pac.2d at 891).

As late as 1955 in *Black v. Cutter Laboratories*, 43 Cal. 2d 788, 278 Pac. 905, 914, *cert. dism.* 351 U.S. 292 (1955), the Supreme Court of California held as follows:

"And in this State the courts have recognized that the type of activity found by the board here to have engaged in by Mrs. Walker—i.e., membership 'in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail'—constitutes a violation of the California Criminal Syndicalism Act. (Pen. Code, §§11400-11402, formerly Deering's General Laws Act §428; see *People v. McCormick* (1951), 102 Cal.App.2d Supp. 954, 962, 228 P.2d 349; *People v. Chambers* (1937), 22 Cal.App.2d 687, 709-713, 72 P.2d 746.)"

See also, *People v. McCormick*, 102 Cal.App.2d Supp. 954, 228 Pac.2d 349, 354 (1951).

It is plain from this summary of the California decisions that the California Criminal Syndicalism Act has in the past been constantly construed to punish advocacy of abstract doctrine, to punish the exercise of freedoms of association and assembly, and acts or conduct which

clearly constituted no more than guiltless behavior. The reliance of appellant therefore upon past rulings of the California courts commencing in 1919 and concluding with *Black v. Cutter Laboratories* in 1955 is clearly misplaced.

3. In the light of the vagueness, ambiguity and overbreadth of the Act, and the tenuous reliance on the state decisions, appellant is compelled to argue that the District Court "should have interpreted the Criminal Syndicalism Act so as to preserve its constitutionality in light of intervening decisions by this Court" [Br. 18]. This is, of course, a concession by appellant that the statute on its face suffers from constitutional uncertainty and overbreadth and that, under the circumstances, the District Court could not appropriately abstain from holding the Act to be unconstitutional [Br. 18-19].

As to the sweep of the statute and the deterrent to the exercise of First Amendment freedoms, little need be added to the cogent analysis of the District Court below [R. 27-36] and to the analysis of similar broad statutory provisions by this Court in *Baggett v. Bullitt*, 377 U.S. 360; *Keyishian v. Bd. of Regents*, 394 U.S. 589; and *Dombrowski v. Pfister*, 380 U.S. 479. These aforesaid cases also underline the decision of the District Court below not to abstain in the circumstances herein. See also, *Ware v. Nichols*, 266 F. Supp. 564 (D.C. Miss. 1967); *Carmichael v. Allen*, 267 F.Supp. 985 (D.C. Ga. 1967); *Baker v. Bindner*, 274 F.Supp. 648 (D.C. Ky. 1967); *McSurely v. Ratliff*, 282 F.Supp. 848 (D.C. Ky. 1967).

Under the criminal syndicalism statute, speaking as it does of "change in industrial ownership or control", or "effecting any political change", any advocacy, teaching,

publication, or association or organization, embracing precepts or doctrines of taxation, integration, reapportionment, social welfare, public ownership, collective bargaining, foreign policy, and a host of political, social and economic changes, would be endangered. The statute would punish any advocacy, teaching, publication and organization if, in the opinion of a judge or jury, such advocacy, teaching, publication or organization included a call for the use of unlawful methods to obtain such lawful ends. Freedom of expression, assembly, and the right to petition for redress of grievances become subject to scrutiny by a trier of the facts so as to determine whether or not advocacy or teaching or other activity includes some reference to "crime, sabotage, unlawful acts of force and violence, or unlawful acts of terrorism". The very existence of the Criminal Syndicalism Act constitutes a deterrent and engenders a chilling effect upon the worker on the picket line, the civil rights marcher in the streets, the teacher in the classroom or the political party critical of the operation of existing institutions. See, *Giacchio v. Pennsylvania*, 382 U.S. 399; *Thornhill v. Alabama*, 310 U.S. 88; *Cramp v. Bd. of Public Instruction*, 368 U.S. 278; *Smith v. California*, 361 U.S. 147; *NAACP v. Button*, 371 U.S. 415; *Aptheker v. Secretary of State*, 378 U.S. 500; and *United States v. Robel*, 389 U.S. 258.

The argument of appellant that federal courts "should now recognize an obligation to construe state statutes so as to save them from valid constitutional objections" [Br. 19] clearly lacks merit. Appellant appears to be arguing that the District Court should have construed the California Criminal Syndicalism Act the same way as the state criminal anarchy statute was construed in *People v. Epton*,

281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), *cert. denied*, 390 U.S. 29, 976 (1968) [Br. 18], and indeed a portion of appellant's brief is essentially devoted to the argument that the District Court should have put the *Dennis* gloss upon the statute and thus purportedly saved the statute from constitutional infirmity [Br. 19-26]. Aside from the fact that the District Court below could not appropriately make such a construction, appellees submit that the call for a *Dennis* gloss should be rejected. As the District Court observed below, it is doubtful in the first place that *Dennis* can be properly resorted to in the light of the subsequent decision in *Keyishian* [R. 29-30]. In the light of subsequent decisions by this Court, it is also doubtful that *Dennis* has vitality in situations where statutes as broad and pervasive as the criminal syndicalism and criminal anarchy laws are involved. The "clear and probable" danger rule invoked in the *Dennis* case does not appear to satisfy First Amendment requirements. Cf., *Wood v. Georgia*, 370 U.S. 375. Moreover, the Smith Act was construed and applied in *Dennis* under a set of facts where there allegedly existed a highly disciplined conspiracy organized to teach methods of forceable overthrow of government.

Such laws as the Criminal Syndicalism Act are so pervasively censorial and so patently restrictive of the exercise of First Amendment freedoms that no construction in terms of "clear and present danger", "intent", or "incitement to action" can save the statute from constitutional infirmity. The statute would still remain uncertain and overbroad, and the deterrent to the exercise of First Amendment freedoms would still exist. As was stated by this Court in *Keyishian*, 394 U.S. at 599:

" . . . The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."

What appellant appears to overlook in this entire argument is the fact that appellee Harris requested the California Superior Court, District Court of Appeal and the Supreme Court of California to pass on the constitutionality of the California Criminal Syndicalism Act and the state courts declined to do so [R. 6; Br. 7]. Appellee Harris urged the unconstitutionality of the Act before the California Superior Court on a motion to dismiss the indictment and continued to urge the unconstitutionality of the Act in his petition for a writ of prohibition and in his petition for hearing [R. 6]. Unlike the federal courts, the writ of prohibition is traditionally employed in California prior to trial to test the constitutionality of statutes. Prohibition is the main jurisdictional writ to test acts in excess of jurisdiction as is the case in judicial action under an unconstitutional law. 1 Witkin, *California Procedure*, Jurisdiction §115, pp. 378-379 (1954). See, *Camara v. Municipal Court*, 387 U.S. 523.

In view of the refusal of the California courts to pass upon the constitutional claims presented, it appears plain that the District Court was duty-bound when the laws and Constitution of the United States were invoked to hold that the California Criminal Syndicalism Act was justifiably

attacked on its face as abridging free expression and other First Amendment freedoms. Having undertaken to consider the validity of the state law, the District Court had no other recourse but to declare the Act patently unconstitutional.

II.

The District Court Had Jurisdiction to Decide the Constitutional Issues Presented by Appellees in Their Complaint.

Appellant argues that the District Court was without jurisdiction to afford appellees declaratory relief with respect to the constitutionality of the California Criminal Syndicalism Act. In effect, appellant urges lack of standing and absence of an actual controversy. Appellant does not dispute the fact that appellee Harris had standing, but urges that appellees Dan, Hirsch and Broslawski did not.

In the first place, the complaint alleges that appellees Dan and Hirsch are members of the Progressive Labor Party which advocates doctrines and precepts seeking change in industrial ownership and control and effecting political change. The complaint also alleges that appellee Broslawski in his capacity as instructor of history teaches about the doctrines of Karl Marx and reads from the Communist Manifesto and other revolutionary works as part of his teaching. All appellees allege that by reason of the existence of the Criminal Syndicalism Act and the prosecution of appellee Harris they feel inhibited in and uncertain about their advocacy and teaching, as aforesaid [R. 5]. Appellant in the District Court moved to dismiss the complaint and therefore accepted these allegations as

true. See, *Walker Process Equipment v. Food, Machine and Chem. Corp.*, 382 U.S. 172, 174-175.

Appellant argues that appellees, Dan, Hirsch and Brosawski "stood in no danger of prosecution" [Br. 28] and therefore no controversy was presented. Appellant overlooks however that the complaint prayed not only for an injunction but for a declaratory judgment that the Criminal Syndicalism Act was unconstitutional on its face in violation of the First and Fourteenth Amendments.

In *Dombrowski*, this Court held that where a statute has an overbroad sweep and is plainly restrictive of First Amendment freedoms, the very presence of the statute itself is a denial of fundamental freedoms. This Court emphasized that defense of a criminal prosecution will not always assure vindication of constitutional rights, that the threats of sanctions may deter almost as potently as the actual application of sanctions. This Court emphasized that in the light of constitutional protections, persons were not required to risk prosecution to test overbroad statutes, and this Court gave as an example the fact that attacks on such overlybroad statutes have been permitted without requiring a showing by the persons making the attack that their own conduct could not be regulated by a narrowly drawn statute. Such a rule, it was pointed out in *Dombrowski*, was enunciated because of the danger of tolerating in the area of First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper applications. Indeed, this Court stated: "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one" (380 U.S. at 494).

Moreover, it is inappropriate for appellant, who has made clear in his brief before the Court [Br. 10-15, and Appendix] that the State proposes to use every provision of the Act if it is permitted to do so, to argue that no "controversy" is presented. The appellant has accepted the fact that appellees Dan, Hirsch and Broslawski desire to advocate and teach principles, precepts and doctrines plainly protected by the provisions of the First Amendment but feel inhibited and uncertain as to their rights to do so in the light of the Criminal Syndicalism Act. This fear of curtailment of protected behavior, this uncertainty as to how to pattern one's speech, advocacy and teaching to avoid sanctions under the statute, is clear evidence of appellees' standing and the District Court's jurisdiction to adjudicate their claims for declaratory relief.

The decisions of this Court, as well as the lower courts, are completely opposed to appellant's position. See, *Baggett v. Bullitt*, 377 U.S. 360, 363-364; *Dombrowski v. Pfister*, 380 U.S. 479; *Zwickler v. Koota*, 389 U.S. 241; *Kirkland v. Wallace*, 403 F.2d 413, 415, n. 4 (5 Cir. 1968); *Baldwin v. Morgan*, 251 F.2d 780, 787 (5 Cir. 1958); *Carmichael v. Allen*, 267 F.Supp. 985, 994 (D.C. Ga. 1967). The recent decision of this Court in *Golden v. Zwickler*, October Term 1968, No. 370, 37 L.W. 4185 (March 4, 1969), does not support appellant. In that case, the allegations of the complaint focused on a particular candidate who subsequently was appointed to judicial office. The plaintiff's concern with the distribution of anonymous literature therefore came to an end so far as the record showed. The New York statute prohibited only anonymous handbills directed to election campaigns.

On the record here, in the light of the provisions of the statute and in the light of the admitted allegations in the complaint, the issues presented to the District Court were not abstract but presented a substantial controversy.

III.

California Penal Code §§11400-11402, the Criminal Syndicalism Act, Have Been Superseded and Preempted by Congressional Legislation.

It is of course settled that where the Federal Government has occupied a field, that field is preempted and the States may not act. *Pennsylvania v. Nelson*, 350 U.S. 497; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218; *Hines v. Davidowitz*, 312 U.S. 52.

The field of sedition has been pervasively occupied by congressional legislation. See the Smith Act (18 U.S.C. 2385); the Internal Security Act (50 U.S.C. 781 et seq.); the Communist Control Act (50 U.S.C. 841 et seq.); and other Congressional acts (18 U.S.C. 2381-2391). In *Pennsylvania v. Nelson*, the Pennsylvania sedition statute there in question provided in part that the word "sedition" should mean "any . . . utterance, or conduct, . . . the intent of which is . . . to encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or against the United States. . . ." [Pa. Penal Code, 18 Purdon's Pa. Stats. Ann. (1939), §4207].

This Court stated in *Nelson* that the congressional legislation aforementioned has made it reasonable to determine

that no room had been left for the State to supplement it. It was held that a state sedition statute is superseded, regardless of whether it purports to supplement the federal law. This Court added (350 U.S. at 509):

"Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable."

On its face, the California criminal syndicalism statute prohibits advocacy, teaching and organizing, affecting both national and state governments and industrial ownership. There is simply no distinction between the state and federal governments in the statute. Indeed the California statute is even broader than the Pennsylvania statute considered in *Nelson*, and the New Hampshire statute involved in *Uphaus v. Wyman*, 360 U.S. 72. Moreover, the Smith Act is not limited to advocacy against the United States Government. It expressly covers "the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein."

These words cannot be read out of the statute. It is not to be presumed that Congress inserted words through inadvertence. On the contrary, "Congress said what it meant and meant what it said". *United States v. Henning*, 344 U.S. 66. The coverage is carefully designed to be, and it is, all inclusive. Moreover, the inclusion of state and local governments was a necessary step in carrying out the

Federal Government's duty "to guarantee to every State in this union a Republican form of government". U.S. Constitution, Art. IV, §4.

The argument that every State has the right to self-preservation does not erase the fact of preemption, nor the rule of *Nelson*. Of course, the State can take steps to preserve itself, but it must give way in the field of sedition to the pervasive federal scheme. State courts which have considered the matter are in accord that following the *Nelson* case, state sedition, criminal anarchy and criminal syndicalism statutes are superseded. See *Commonwealth v. Gilbert*, 334 Mass. 71, 134 N.E.2d 13; *Commonwealth v. Hood*, 334 Mass. 76, 134 A.2d 12; *Commonwealth v. Dolson*, 183 Pa.Super. 339, 132 A. 692; *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky.); *State v. Jenkins*, 236 La. 300, 107 So.2d 648; but cf. *State v. Cade*, 244 La. 534, 153 So.2d 382. See also, *Albertson v. Millard*, 345 Mich. 519, 77 N.W.2d 104, holding Michigan's "Little McCarran Act" to be superseded.

Uphaus v. Wyman, 360 U.S. 72, does not militate against appellee's position. There is nothing in that case which permits the conclusion that the Court was sanctioning state sedition prosecutions for advocacy of overthrow of state or local governments or for advocacy of criminal syndicalism. All that *Uphaus* did was permit the State to make investigative inquiries as to matters which may have affected state interests. But this is a far cry from sanctioning state sedition prosecutions. Moreover, it must be remembered that the actual inquiry to Dr. *Uphaus* was with respect to his registration list or cards—information which was required to be kept by every place of accommodation in the State.

In *Dombrowski v. Pfister*, 227 F.Supp. 556 (D.C. La. 1964), reversed on other grounds, 380 U.S. 479, the question of federal supersession was considered. The majority of the three-judge court found no preemption, relying upon *Uphaus*. Circuit Judge Wisdom dissented (227 F.Supp. at 578):

"*Uphaus* reaffirmed *Nelson*; it did not overrule *Nelson*. As long as *Nelson* stands, a State may not define as a crime the same conduct Congress proscribes, even though the State's indictment is limited to sedition against the State."

Nelson represents the law today. Of necessity, therefore, California's Criminal Syndicalism Act is unconstitutional.

IV.

28 U.S.C. 2283 Did Not Bar the Grant of Injunctive Relief by the District Court Under 42 U.S.C. 1983.

As initially noted in the brief herein, the question as to whether 28 U.S.C. 2283 deprived the District Court of power to grant injunctive relief against the pending criminal prosecution was not raised by the appellant in the District Court and was not included in the questions presented in appellant's Jurisdictional Statement.

In any event, appellant's position cannot be sustained. In the first place, appellant concedes that §2283 does not involve the jurisdiction of the Court. As early as 1924, this Court held that the Section "does not prohibit in all cases injunctions staying proceedings in a State court". *Smith v. Apple*, 264 U.S. 274, 279.

It is therefore not a question of jurisdiction but a question of comity which appellant invokes.

We deal here with a state statute which is clearly unconstitutional. It constitutes a severe and pervasive restriction upon the exercise of basic freedoms. Its language is extremely broad and vague and uncertain. The statute contravenes the First Amendment because it unduly prohibits freedoms of speech, press, the right of assembly and association and the right to petition for redress of grievances. It punishes the advocacy of ideas and makes it an offense merely to publish, print or circulate literature which may be deemed "seditious" by governmental officials. It punishes guiltless behavior and virtually sweeps within its ambit every fundamental idea of social, political or economic change.

It is against the enforcement of this statute by prosecution and indictment that appellee Harris sought the protection of a Federal Court. Under the laws of the United States, appellee Harris was granted the right to seek redress in a Federal Court, and Congress gave the District Court specific jurisdiction to entertain such action and grant appropriate relief. The action instituted by appellee Harris did not affect the power of the State; the action sought relief under the Supremacy Clause of the Constitution of the United States, which makes the Constitution of the United States and the laws of the United States the Supreme Law of the Land. Appellee Harris was seeking the protection of Federal rights in a Federal forum, and a Federal Court was without power to deny him relief.

Under the circumstances, appellees submit that the injunctive relief granted below was "expressly authorized by

Act of Congress" and, indeed, was necessary "in aid of its jurisdiction" and "to protect or effectuate its judgment". Appellees submit that Congress expressly qualified the negative command of 28 U.S.C. 2283 when it enacted the Act of April 20, 1871, the predecessor to 42 U.S.C. 1983. "Certainly section 1983, considered in the context of its legislative history and its role in the federal courts today, is 'incomparable' [sic] with a statute which makes it impossible for any relief to be granted. In those cases, the remedy is completely destroyed. To suggest that this was the intent of the legislators who wrote section 1983, in light of what they said of the importance of protecting federal rights from infringement by the states, and in light of their expressed desire to place the national government between the state and its citizens, is to suggest an untenable conclusion." Note, "The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights" in 21 *Rutgers Law Review*, 92, 124 (1966). See also, Boyer, "Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights" in 13 *Howard Law Journal*, 51-107 (1967).

Not only do law and history support the grant of injunctive relief in §1983 actions, but it is submitted that prosecutions under statutes which are so clearly unconstitutional on their face as are involved herein should be stayed by a Federal Court if the Constitution of the United States and the Laws of the United States are to be upheld in our Federal System. The case herein did not involve the enforcement of a valid statute and the attempt to interrupt a trial in progress by the claim of denial of some Federal right. The case herein involves a threatened prosecution under the statute which all are agreed is facially unconstitutional.

It should be added that appellant's argument against the grant of the injunction appears to be quite tentative. Appellant seems to indicate that the injunction was unnecessary since the declaratory judgment pronouncing the statute invalid would have been sufficient, it being implied that the state officials would not have brought any action to enforce the Act until a final judgment was rendered [Br. 37]. As a matter of fact, the District Court below proceeded very much the way appellant now suggests [R. 38], but the injunction was issued in order not to deprive the appellant "of the right to appeal to the Supreme Court otherwise accorded him by 28 U.S.C. §1253" [R. 38]. Appellant does not appear to deny the State's duty to refrain from enforcing the law once the law was declared unconstitutional, but appears to be objecting to the formal grant of an injunction which was only done to protect appellant's right to appeal.

In any event, appellees submit that the District Court below was entirely correct in holding the statute unconstitutional and in granting injunctive relief to prevent the irreparable injury to appellees and to the community from any enforcement of the said Act, and that §2283 was not a bar to such action by the District Court.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

FILED

26
SEP 4 1969

October Term, 1969

No. 4 2

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., et al.,

Appellees.

Appeal From the United States District Court for the
Central District of California.

**APPELLEES' SUPPLEMENTAL BRIEF
ON REARGUMENT.**

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IN THE
Supreme Court of the United States

October Term, 1969
No. 4

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

Appeal From the United States District Court for the
Central District of California.

**APPELLEES' SUPPLEMENTAL BRIEF
ON REARGUMENT.**

SUMMARY OF ARGUMENT.

Before the District Court below declared California's Criminal Syndicalism Act unconstitutional, appellee Harris unsuccessfully sought relief in all the Courts of California, the state courts having failed to narrow the statute to comply with applicable constitutional limitations—particularly by failing to require that advocacy be accompanied by "incitement to imminent lawless action."¹

¹As required by this Court, in its unanimous decision in *Brandenburg v. Ohio*, 395 U.S. 444.

In the special circumstances of this case, the refusal of the District Court to abstain from adjudicating the constitutionality of the statute, was not an abuse of discretion; nor did it err in holding unconstitutional, provisions of the statute under which appellee Harris was not charged.²

²The appellant has seen fit to submit to this Court, as an Appendix to his brief, leaflets published by organizations (including George Lincoln Rockwell's American Nazi Party), in *no* way connected wth any appellee. Appellee Harris deems it appropriate to furnish to this Court, as a separate Appendix to this brief, all of the evidence before the grand jury and all the proceedings in the California Courts. (The pleadings filed in the appellate Courts of California include the proceedings in the trial court and before the grand jury.)

ARGUMENT.

I.

THE CALIFORNIA COURTS HAVE NOT LIMITED THE STATUTE, TO COMPLY WITH APPLICABLE CONSTITUTIONAL LIMITATIONS.

No charge in the indictment, no evidence before the grand jury, and no construction of the Criminal Syndicalism Act by the California courts, meet constitutional requirements.

1. The Indictment.

The instant indictment is in the language of the statute; the only items which are set forth in the indictment, and are not in the Act, are the texts of two leaflets.

The only "acts" charged against appellee Harris³ are the distribution of these leaflets—one on May 25, 1966, and the other, the next day, May 26, 1966.⁴

The indictment does *not* allege that the appellee's advocacy of a "change in industrial ownership and control", or the *affecting (sic) political change*" was limited to such change of the State of California, or any of its political subdivisions;⁵ nor that the appellee intended

³From now on, when we refer to appellee, we shall be advertising to Harris.

⁴If ever there is a case involving the exercise of free speech and free press, in its "classic", its "pristine", its "pure" form—this is that case. For doing so, appellee faces a penitentiary sentence of 28 years, 14 years for each leaflet distribution. (California Penal Code §11401, Appellant's Br. p. 4.)

⁵Cf. indictment, in *Samuels v. Mackell*, this Term, No. 11, R. 10 a.

that such change be "presently attempted or accomplished"⁶ nor does the indictment talk of "rifles, shot-guns, firearms, bombs . . .".⁷

No allegation in the indictment charges "incitement to imminent lawless action."⁸

The trial court upheld the Act, but did *not* narrow its broad sweep. Its minute order (Appendix C, to Petition for Writ of Prohibition in the District Court of Appeal) recites:

"The Court finds that it is of the opinion the statute involved is not unconstitutional and therefore the demurrer is overruled."

2. The Evidence Before the Grand Jury.

The transcript of *all* the testimony before the grand jury, discloses *no* evidence of any of the items mentioned above, as *not* appearing in the indictment.⁹

In that respect, the evidence in the case at bar, substantially differs also from:

(1) *Epton v. New York*, 390 U.S. 29, 30, in which Justice Stewart stated: "But the State in these cases presented proof that Epton had actively participated in the formation of a group dedicated to armed revolt against the police under the direction of "block captains" and with the assistance of "territorist bands" equipped with Molotov cocktails that Epton himself had explained how to use."

⁶*Ibid.*

⁷*Ibid.*

⁸*Brandenburg v. Ohio*, 395 U.S. 444, 449.

⁹We shall discuss later, with more specificity, the nature of the showing before the grand jury.

(2) *Brandenburg v. Ohio*, *supra*, at p. 445, where the evidence introduced included "a pistol, a rifle, a shotgun, ammunition . . ."¹⁰

(3) *Dennis v. United States*, 341 U.S. 863, which involved a "group of sufficient size and cohesiveness," "sufficiently orientated to actions", so that its "indoctrination in preparation for future violent action" (see *Yates v. United States*, 354 U.S. 298, 321), and activities were not protected by the First Amendment.

3. The Proceedings in the California Courts.

Appellant suggests (Brief, p. 25) that in the case at bar, the courts of California were not accorded the "opportunity of construing state statutes (referring to the Criminal Syndicalism Act) in conformity with constitutional requirements."¹¹

Appellant seems to assert (Brief, p. 25) that appellee "first tested" the constitutionality of the Act in the District Court.

The contrary is the fact.

It was only *after* appellee gave *all* California Courts, trial and appellate, full opportunity to narrow the statute, on its face, and as applied to appellee, did he seek relief in the United States District Court.¹²

¹⁰Here, no fire-arms—not even a pop-gun.

¹¹See also Appellant's Brief, p. 19: "State courts are thus denied the initial opportunity to preserve the constitutionality of state statutes . . ."

¹²This is demonstrated by the Petition for Writ of Prohibition in the California District Court of Appeal, and the Petitions for Hearing in California Supreme Court set forth in the separate Appendix to this brief. It is further supported by the factual recitals—*undenied* in the Complaint in the District Court: Paragraph VIII, R. 6.

Under California procedure, the trial court, in the first instance, and the appellate courts thereafter, review the sufficiency of evidence before a grand jury, and halt a prosecution, *prior* to trial, if there is a lack of evidence to support the indictment, or a total absence of evidence supporting a necessary element of the crime charged.

The law of California has always recognized that no one—even in the “routine” criminal prosecution—where there is insufficient evidence before a grand jury of the offense charged—could “be required to stand trial and to appeal from a possible adverse judgment (after trial) without being subjected to unreasonable expense, inconvenience and delay”. (*Greenberg v. Superior Court*, 19 Cal. 2d 319, 323.) The California courts have long recognized that even on a “conventional ‘criminal charge’ it would be a grave injustice to petitioner if she were required to undergo the ordeal, ignominy and expense of a trial under the circumstances,”¹³ (where there is insufficient showing before a grand jury.) (*Jensen v. Superior Court*, 96 Cal. App. 2d 112, 118.)

In accord are:

Callan v. Superior Court, 204 Cal. App. 2d 652, 662;

People v. Bartlett, 199 Cal. App. 2d 173, 179;

People v. Byars, 188 Cal. App. 2d 794, 796;

Davis v. Superior Court, 175 Cal. App. 2d 8, 23.

In this case—a prosecution solely for distribution of handbills, and hence subject to the constitutional limita-

¹³We shall discuss later the particular hardship upon a defendant on trial in a state sedition prosecution.

tions established by this Court when the First Amendment is at stake—there are three essential elements:

- (1) Clear and present danger;
- (2) Direct incitement to imminent lawless action; and
- (3) Specific intent to incite acts directly and immediately in violation of law.

Each of the foregoing was fully urged in all of the California courts;¹⁴ had any of them narrowed the sweep of the statute on its face by applying any one of the three foregoing limitations, the instant indictment should have been ordered dismissed.

i. **No Evidence of "Clear and Present Danger."**

The prosecution was required to establish that on May 25 and May 26, 1966, the matter set forth in Counts I and II of the Indictment was circulated by appellee under such circumstances as to create a clear and present danger that "a change in industrial ownership and control" and "political change" would be immediately accomplished. In support of this essential element of the offense, the record is entirely barren. There is not the slightest indication in the record that there was any danger of a change in industrial ownership or control or political change as a result of the alleged distribution by the appellee of the two leaflets on the steps of the County Courthouse in Los Angeles during an inquest.

There was testimony from Pierce Brooks, a Lieutenant of Police for the City of Los Angeles [Grand Jury

¹⁴See proceedings in the California Courts in the separate Appendix hereto.

Tr. 22], and from Allen K. Archbald, a police officer of the City of Los Angeles [Grand Jury Tr. 28], which covers approximately 30% of the entire Grand Jury Transcript. The testimony of these two officers dealt with certain events which occurred in the Watts area in Los Angeles in August of 1965 and on March 15-16, 1966. The description of the events included details of injuries to police officers, firemen and civilians which occurred during the aforesaid periods.

The testimony dealt with events which antedated by months or a year the alleged violations charged in the Indictment. By no manner of logic or reason can it be argued that the distribution of a leaflet on May 25 and 26, 1966 in any way created a clear and present danger of events which had already long passed. Nor can it be argued that such testimony was offered to indicate what might happen in the future. Prediction of events in the future from events which occurred in the past is wholly arbitrary, capricious and conjectural. The causes of the Watts riots were highly complex, and there is simply no rational connection between the circulation of two throw-away leaflets on May 25 and 26, 1966 on the steps of a Courthouse with events of the past or any alleged events in the future. Moreover, in either case, the evidence was immaterial and irrelevant, because it in no way was related to any question of clear and present danger on May 25 and 26, 1966, and the evidence was highly incompetent and prejudicial which could have only influenced the Grand Jury arbitrarily against the accused in returning the Indictment and the serious charge contained herein.

See,

Shepard v. United States, 290 U.S. 96.

The testimony of S. L. Holmes, a Captain in the Los Angeles County Sheriff's Office [Grand Jury Tr. 35], showed at the time of the inquest and when it was necessary to obtain larger quarters for the hearing, there were at least 270 police officers available to handle the public desiring to get into the hearing [Grand Jury Tr. 37]. There was the usual pushing and trying to get into the Courtroom, but there is not the slightest indication that there was any clear and present danger of any real disturbance occurring.

Moreover, and it should be emphasized here, that the charge here involves doctrines or precepts advocating change in industrial ownership or political change. The charge here is not disturbing the peace or creating a riot. There is nothing in the testimony to indicate that there was any clear and present danger that industrial ownership or political change was in any way affected by the events of May 25 or May 26, 1966.

The testimony of Oliver Taylor, a Sergeant of the Los Angeles County Sheriff's Department [Grand Jury Tr. 40], simply states that he saw some spectators carrying leaflets, and then further states that other spectators, not identified, "threatened" him and other officers, and that one spectator in effect told the officers that they should not turn their backs on the spectator because if they did he would kill them [Grand Jury Tr. 45]. There is nothing in the record to indicate that those who made these statements had ever seen the leaflets or in any way affected the police officers; nor is there anything to indicate that the officers did not handle the situation in an appropriate manner.

Taylor v. Mississippi, 319 U.S. 583;

Wood v. Georgia, 370 U.S. 375;

Pennekamp v. Florida, 328 U.S. 331;

Herndon v. Lowry, 301 U.S. 242.

ii. No Evidence of "Incitement to Imminent Lawless Action".

Turning to the second necessary element of the offense, it appears that the nature of the language contained in the two leaflets here involved is devoid of "incitement to imminent lawless action." Nothing in the two leaflets calls for immediate action to accomplish a change in industrial ownership or political change. These leaflets contain essentially language which protects existing conditions; calls for reform; and predicts that historically unbearable and tyrannical conditions can only result in resistance by those subjected to such conditions.

The nature and possible effect of a writing cannot be properly determined by picking out here and there a sentence and presenting it separated from the context. It is not apparent on a reading of these two leaflets how it could rationally be held that these leaflets could have in any way threatened immediately and presently industrial and political institutions of the State.

What is the import of the first leaflet contained in Count I of the Indictment? Reading the writing in context, it is plain that it is a protest on behalf of the Negro people in the South of Los Angeles area against alleged police brutality, and the injustice of wholesale unemployment of Negro people in the area who constitute 80% of the work force therein. It is a protest against "murder by cops and death by unemployment". The leaflet stresses that such methods result only in extermination of persons who feel themselves hemmed in as if they were in a concentration camp facing eventual death and destruction.

The leaflet calls for this dire situation to be remedied. It states that the killing of citizens by the police must be brought to an end; that the police should be disarmed; that residents must be given employment in the factories in the area. The slogans employed in the leaflet all call for future action. There is no call for direct immediate action in the entire leaflet. That the concentration camp must develop its own court; that officials must be brought to trial for murder; that citizens will not produce if they do not work, are all prophecies, hopes and expectations which plainly do not call for immediate action.

The leaflet contained in Count II of the Indictment is equally devoid of language inciting to immediate and direct action. The leaflet commences with a quotation from Frederick Douglass made in 1856, wherein the question is posed, whether millions will forever submit to "every unnamed evil" which an "irresponsible tyranny" can devise, because "the overthrow of that tyranny would be productive of horrors." It is stated in the same quotation that the recoil against such horrors will be in exact proportion "to the wrongs inflicted". It is submitted that this philosophy expressed by one of the great leaders of the Negro people is no more than sound American doctrine expressed by the Founding Fathers of the Nation. A tyranny which is unbearable, whether it is the tyranny of a George III, or a Hitler tyranny, cannot be borne forever, and people will revolt even though such defensive action may be violent. Clearly, this quotation from Frederick Douglass expressing a fundamental historical truth cannot be deemed language of incitement to immediate action.

Following the quotation, most of the leaflet thereafter is concerned with the great unemployment problem of black workers in the South Los Angeles area, and the injustice of the grounds for denying employment to such residents. It is argued that public officials acted brutally against the Negro people on prior occasions to protect the interests of the factory owners and other businesses against the interests of the residents of the community.

The final paragraph of the leaflet is again no more than language which deals with the future. It does not call for any immediate action to change the industrial or political institutions. It speaks of the Nation having the right to revolution, and what a revolution means; stresses the need for organization at such a time; and a recognition of the fact that revolt against a tyrannical system may result in suffering by participants.

Neither of the aforesaid leaflets is violative of the statute in the light of the free speech and press provisions of the Federal Constitution.

Cantwell v. Connecticut, 310 U.S. 296, 310;
Schneiderman v. United States, 320 U.S. 118,
157-159;
Wood v. Georgia, 370 U.S. 375;
Terminiello v. Chicago, 337 U.S. 1;
Bridges v. California, 314 U.S. 252;
New York Times Co. v. Sullivan, 376 U.S. 254;
Garrison v. Louisiana, 379 U.S. 64;
Taylor v. Mississippi, 319 U.S. 583;
Edwards v. South Carolina, 372 U.S. 229.

iii. No Evidence of Specific Intent.

On the issue of specific intent, the record is devoid of any evidence to show that appellee construed the

language of the leaflets as a call for immediate or direct action; and the record is devoid of any evidence to show that the appellee, in his own state of mind, in any way intended to immediately and directly accomplish changes in industrial ownership or political change on May 25 and 26, 1966. There is no evidence in the record that appellee had anything to do with the writing, preparation or printing of these leaflets. There is no evidence in the record that appellee even read these leaflets. The leaflets do not bear his name. There is no evidence in the record that appellee ever said a single word on May 25 or 26, 1966, or that he ever did anything of any kind on those days, other than merely hand out the two leaflets. Under such circumstances, it cannot be stressed too strongly that there is complete lack of evidence to prove the essential ingredient of the evil state of mind required by law and the Constitution.

The standards for assessing advocacy of proof needed to make out a case of criminal speech are necessarily strict if the guarantees of the provisions of the Bill of Rights are to be preserved. If proof of guilty knowledge and intent is not established, or, in other words, if *scienter* is eliminated from prosecutions under the Criminal Syndicalism Law, then the statute so construed and applied substantially restricts freedoms of speech and press; causes a self-censorship detrimental to the community and its access to constitutionally protected ideas; and results in the statute violating both the procedural and substantive due process provisions of the First Amendment.

If the State contends that it has a right to prevent the dissemination of the leaflets herein involved and to punish appellee for handing them out, then at the very

least, it is submitted, there should have been proof of specific unlawful knowledge and intent which was clear, convincing and unequivocal, and free from doubt. Instead, the State chose to present no evidence to the Grand Jury who returned the Indictment herein. In view of this failure of proof, the Indictment offends the First Amendment.

Hartzel v. United States, 322 U.S. 680;
New York Times Co. v. Sullivan, 376 U.S. 254;
Herndon v. Lowry, 301 U.S. 242;
Smith v. California, 361 U.S. 147;
Schneiderman v. United States, 320 U.S. 118;
Keegan v. United States, 325 U.S. 478;
Fiske v. Kansas, 274 U.S. 380;
Elfbrandt v. Russell, 384 U.S. 11.

We are as baffled—as this Court may be—in attempting to determine why the courts of California—particularly its Supreme Court, did not—as, for example, the New York Court of Appeals did in *People v. Epton*, 19 N.Y. 2d 496 at 507, 281 N.Y.S. 2d 9 at 17, (Transcript in *Samuels*, #11, at 69a) narrow California's Criminal Syndicalism Act,¹⁵ in the case at bar; and,

¹⁵It suggested some narrowing, albeit in dictum, as stated by Appellant, (at p. 17) in 1946, in *Danskin v. San Diego School District*, 28 Cal. 2d 536, 171 P. 2d 885, 891, to "imminent danger".

Much more recently, in *American Civil Liberties Union v. Board*, 59 Cal. 2d 203 (1963) (relying on *Whitney v. California*, 274 U.S. 357) it upheld the statute without suggesting any constitutional limitation, in a case in which its ruling on that issue was *not* dictum.

In any event, neither the California Supreme Court, any California intermediate Court of Appeals, nor even any trial court, has ever limited the statute as did the New York Courts in *Epton, supra*; nor has any California court by judicial gloss or interpretation narrowed its application to advocacy which constitutes incitement to imminent lawless action.

why it failed to apply the constitutional standards we urged upon it.

But the hard, inescapable fact is that, *in this case*, and as to *this* appellee, it didn't.

And that is why he sought relief in the United States District Court below.

II.

IN THE SPECIAL CIRCUMSTANCES OF THIS CASE AND IN THE SPECIAL CONSIDERATIONS HERE THE REFUSAL OF THE UNITED STATES DISTRICT COURT TO ABSTAIN FROM DECIDING THE CONSTITUTIONALITY OF THE STATUTE WAS NOT AN ABUSE OF DISCRETION.

These circumstances and considerations are:

1. Appellee made every effort to persuade the California courts to limit the overbreadth of the statute. Complaint, U.S. District Court, paragraph VIII, R. 6.

Under the law of California and under California procedures, both the unconstitutionality of a statute, and the sufficiency of the evidence before a grand jury, as to every essential element of the offense charged, may be challenged prior to trial, in the trial court and in the appellate courts. Such a challenge was made by appellee. Paragraph VIII, R. 6; see, also, District Court's opinion, R. 21.

2. The *only* "acts" charged against appellee was the distribution of leaflets. Complaint, Paragraph VI, R. 6.¹⁶

¹⁶At the oral argument before the District Court, the judges requested that the leaflets be submitted to the Court; they were.

(The appellant in the District Court filed no answer; submitted no affidavit; made no claim, comparable to those asserted in *Samuels*, or *Epton, supra*; nor, was any such assertion made in any of the California courts.)

Accordingly, it was clear to the District Court that at issue was "pure" speech—not speech brigaded with arms.

3. The California Criminal Syndicalism Act is an old statute;¹⁷ it was adopted by the legislature of California half a century ago; it was enacted to deal with what California legislators then deemed a specific need^{17a} dangers from a particular organization, the Industrial Workers of the World. That group is no longer in existence, in California, or anywhere else; and danger from it is similarly non-existent.¹⁸ Neither

¹⁷It is a statute, not a Constitution; it is not a Constitution designed to meet changing needs, and codify great principles for future generations.

^{17a}It may be that there was in California a "clear and present danger", from its activities. The California Legislature made findings to that effect, declaring "large numbers of persons (were) going from place to place, in this State . . . practicing criminal syndicalism", i.e., sabotage. (Emphasis ours.) Section 4 of the Act, quoted in Mr. Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357, 379. Indeed, Justice Brandeis was of the view that:

"In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of the Industrial Workers of the World, to conduct *present serious crimes.*" (Emphasis ours).

¹⁸See *Dowell*, "A History of Criminal Syndicalism Legislation in the United States," LVII Johns Hopkins University Studies in Historical and Political Science (1939) (cited by this Court in *Brandenburg*, at p. 447, *supra*); also, *Chafee*, Free Speech in the United States, Ch. 10, p. 326, et seq.; as well as *Woodrow C. Whitten*, Criminal Syndicalism and the Law in California: 1919-1927, in Transactions of the American Philosophical Society, New Series, Volume 59, part 2, 1969, and *Prof.*

the Legislature of California, nor any California court, has, during the last four decades, found any comparable danger; the alarms of California's Attorney General (Appellant's Brief, pp. 10-15) are the partisan rationalizations of an over-zealous prosecutor.¹⁹ He ap-

George W. Kirchwey, "A Survey of the Workings of the Criminal Syndicalism Law of California," 1926 (pamphlet published by the American Civil Liberties Union).

Because we are uncertain whether the Library of this Court, or the Congressional Library has the last two documents, we are forwarding them to the Librarian of this Court, for convenient access to the members of the Court; we are submitting them first to counsel for the appellant.

¹⁹None of the publications or incidents referred to was submitted as evidence before the Grand Jury; in point of fact, they couldn't have been; they are all two or three years *after* the appellee's circulation of the "forbidden" leaflets. Indeed, the Attorney General would outlaw some advocacy if it contained "rhetoric" (Brief, p. 12, f.n. 1).

He considers speech "quite literally, a lethal weapon." (p. 14).

To be noted is that the legislature of California (or any judge in California) has not seen the peril to California, or its political subdivisions, which the prosecutors "discovered" in the preparation of appellant's brief in this Court; nor has the legislature (since 1919) seen the need for legislation protecting California from a "change in industrial ownership or control" or from political change, from advocacy or otherwise.

And yet when confronted with a specific evil or need, it has acted and with "urgency." In 1966, it made penal "incitement to riot" Penal Code §404.6; in 1965, as stated by appellant (p. 11) it enacted Penal Code 11460, to bar practicing with weapons.

We have already adverted to the special findings made by the California legislature in 1919, upon adopting the Criminal Syndicalism Act.

When confronted with what it deemed to be a danger from Communism, it made elaborate findings in 1953, in Government Code §1027.5; as it did again in 1959, in Education Code §12591.

In both these findings it used the phrase "clear and present danger," as it did in Penal Code §404.6, in 1966.

We suggest, accordingly, that if there were a clear and present danger in California in 1969 (or there were in 1966 when ap-

(This footnote is continued on the next page)

parently is on a crusade to save "distorted perceptions of sick minds" from "hate literature"; (Appellant's Brief, p. 14) and finds authority so to do battle in the courts, by criminal prosecutions, under California's Criminal Syndicalism Act.

Thoughtful scholars have weighed the statute, and found it wanting.

Dowell, supra (at p. 145), condemns it as designed "to eliminate the existence and activities of radical groups."

Whitten, supra, after studying the administration of the Act in the California Courts, concluded (at p. 64) that it was, in one respect, an instrument of "governmental suppression unwarranted by the facts and conditions of the times, and hazardous to American civil liberties."

Chaffee, supra (at p. 327), noted that "these Criminal Syndicalism Acts soon became a dead letter in most States, not so in California."

(In point of fact, it did, after the 20's; it was disinterred and revived in the 30's, (albeit in only two prosecutions)—this time against agricultural workers' leaders who were Communists:

People v. Horiuchi, 114 Cal. App. 415, 300 Pac. 457 (1931) and *People v. Chambers*, 22 Cal. App. 2d 687, 72 P. 2d 746 (1937).

appellee distributed the leaflets) from advocacy of change the legislature of California would have seen it as clearly as the prosecutors in the case at bar.

The appellant sees shadows—that are the product of his own imagination.

California is not in peril; and appellee's leaflets did not put it in peril.

The case at bar is the first prosecution in over three decades.

In 1926, Prof. Kirchwey, *supra*, (at p. 37), after a thorough study, considered use of the Act had come to an end.

He concluded: "The game is over. It wasn't a good game and it was on the whole, badly played,²⁰ in an amateurish way and with too little of the professional spirit—much too savagely and with too little regard for the rules of the game."²¹

In the instant prosecution, California seeks to resume the game; the California Courts should have stopped it; they didn't.

In the light of the foregoing, it was entirely proper for a United States District Court to do so.²²

4. The jurisdiction of the District Court, to adjudicate the constitutionality of the statute by declaratory judgment, seemed clear to it; it is based upon a recent *unanimous* decision of this Court, *Zwickler v. Koota*, 389 U.S. 241 (1967); upon which the court below properly relied and appropriately followed.

²⁰Witness the prosecutor's approach as demonstrated in Brief for Appellant, pp. 10-15, and Appendix thereto.

²¹It is the kind of a state enactment of which this Court said, in *Thornhill v. Alabama*, 310 U.S. 97, 98:

"The existence of such a statute which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purposes."

²²There is no more warrant for prosecutions under a state sedition statute in 1969, than there was for the enforcement of the federal Sedition Act in 1798. See *New York Times v. Sullivan*, 376 U.S. 254, 273.

In *Zwickler* (at p. 255), Mr. Justice Harlan summarized the rationale for the doctrine of abstention with the following quotation from *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 32; that "abstention" is appropriate "where the order to the parties to repair to the State Court would clearly serve one of two countervailing interests: either the avoidance of premature and perhaps unnecessary decision of a serious constitutional question, or the avoidance of the hazard of unsettling some delicate balance in the area of federal-state relationships."

The ruling of the District Court here offended neither of these interests.

(1) It was neither premature nor unnecessary;²³ the appellee has already been through all the California courts.

(2) Its ruling does not upset any balance between state and federal judicial power; it should come as no shock to any state court, when it has refused or failed

²³Surely a defendant, in a state sedition case, ought not to be required to submit, prior to securing redress from a United States Court, where he asserts an abridgement of the United States Constitution, to the vast sweep and long weeks of such a trial.

These are now of common knowledge from considerable experience with such trials in the 1950's. And, in the instant case, California prosecutors propose to try appellee not alone for his words, but for the publications and activities of persons and organizations, on the extreme political left and right, with none of whom he had had any contact, some of whom he devoutly detests—and with one of whom, who is now dead (See Appendix, p. 46, sketch of George Lincoln Rockwell).

No man should be subjected to such a trial (under such a statute as here); certainly, no poor man.

No Negro should be thus subjected; certainly, no poor Negro.

(This Court has permitted appellee to defend the instant appeal *in forma pauperis*.)

to exercise its jurisdiction to protect a United States constitutional right, for a United States Court to exercise its jurisdiction, and protect that right.

Indeed, the appellant, as we understand him (Brief at p. 37) does not question the jurisdiction of the District Court to enter a declaratory judgment—for he cites, with apparent approval, *Ware v. Nichols*, 266 F. Supp. 564 at 569, in which a United States District Court declared Mississippi's Criminal Syndicalism Act to be unconstitutional.²⁴

The objection of the appellant is to the preliminary injunction issued (*Ibid.*, p. 37).

But that interstitial injunction *pendente lite* was proper for two reasons:

1. It was ordered out of a concern of the Court below, for the *rights* of the *appellant*—to assure that he had a right of appeal to this Court [R. 38].
2. The appellant having filed no responsive pleading in the Court below, that Court, manifestly, could not enter a final declaratory judgment; it, therefore, following its ruling and opinion of March 11, 1968, retained jurisdiction over the cause until final judgment, on the merits; accordingly, it had jurisdiction to issue a preliminary injunction, "because necessary in aid of its jurisdiction", within that express provision in 28 U.S.C. §2283.

²⁴In *Cameron v. Johnson*, 390 U.S. 611, a unanimous Court again held declaratory judgment by a United States District Court appropriate.

III.

BOTH APPELLEE HARRIS AND THE OTHER APPELLEES HAVE STANDING IN THE DISTRICT COURT TO CHALLENGE THE CONSTITUTIONALITY OF ALL SECTIONS OF THE STATUTE.

The central constitutional challenge in the District Court of the *entire* statute, by all the appellees, is its overbreadth, on its face, after the California courts had failed to narrow it, on its face or as applied; and the statute affects speech.

In that circumstance, the appellant is in error in urging, in effect, that the constitutionality of each provision of the Act be separately adjudicated, in a series of criminal prosecutions. It is precisely where a "plethora of statutory provisions are assailed as invalidly, vague, uncertain or over-broad, with a consequent reach into areas of expression protected by the First Amendment" that "hammering out the structure of the statute piecemeal" is not required.

Mr. Justice White, dissenting in *Cameron v. Johnson*, 381 U.S. 741, 754, 756.

See also *Baggett v. Bullitt*, 377 U.S. 360 and *Dombrowski v. Pfister*, 380 U.S. 479.

The appellees, other than Harris, in the complaint in the District Court (prior to their counsel's reading Mr. Justice White's words, in *Cameron, supra*) in effect allege [R. 5] that the statute has an *in terrorem* effect upon their expression of opinion as members of the Progressive Labor Party, and as history instructor, respectively.

They find support in their apprehension because of the sweep of the statute—its overbreadth and vague-

ness, in the views of Justice Clark, speaking for the Court in *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 36.

Speaking of the First Amendment, he said: "There we are concerned with the vagueness of the Statute 'on its face' because such vagueness may in itself deter constitutionally and socially desirable conduct."

All appellees have standing to complain—as they do complain—that the presence of the statute in the California Penal Code (as an enforceable provision) for half a century is too long.

Respectfully submitted,

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WILLIAM J. YOUNGNESS,

Appellee.

JOHN MARKS, JR., et al.,

Appellants.

Appeal From the United States District Court for the
Central District of California.

**APPENDIX TO APPELLANTS' SUPPLEMENTAL
BRIEF ON REARGUMENT.**

(Portions of Documents Lodged With the Clerk of
This Court).

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IN THE
Supreme Court of the United States

October Term, 1969
No. 4

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

Appeal From the United States District Court for the
Central District of California.

**APPENDIX TO APPELLEES' SUPPLEMENTAL
BRIEF ON REARGUMENT.**

(Portions of Documents Lodged With the Clerk of
This Court).

In Appellees' Supplemental Brief on Reargument
(page 2, f.n. 2) we stated to this court:

"The appellant has seen fit to submit to this Court, as an Appendix to his brief, leaflets published by organizations (including George Lincoln Rockwell's American Nazi Party), in no way connected with any appellee. Appellee Harris deems it appropriate to furnish to this Court, as a separate Appendix to this brief, all of the evidence before the grand jury and all the proceedings in the California Courts. (The pleadings filed in the appellate Courts of California include the proceedings in the trial court and before the grand jury.)"

We have submitted all of the proceedings in the California Appellate Courts to the Clerk of this Court for printing at the Government's expense. (This Court has entered an order permitting appellee to defend herein *in forma pauperis*.) We have been advised by the Clerk that the Appendix to our Supplemental Brief will not be printed but will be held in his office and will be available to the members of the Court. With that determination by the Clerk, we have no quarrel. We are of the view, however, that the indictment and the transcript of the grand jury proceedings should be in a form more convenient to the members of the Court than lodgement of a single copy with the Clerk of the Court.

Because we do not have the funds to print all the documents we print here the Indictment and the Grand Jury Transcript.

We are making these documents (as well as the other documents lodged with the Clerk) available to the Court for the limited purpose of bringing to the attention of this Court the nature of the proceedings in the California Courts; and solely pertaining to the abstention point in this case.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
FRANK S. PESTANA,

Attorneys for Appellees.

INDICTMENT.

CRIMINAL SYNDICALISM

(Sec. 11401(3), P. C.)—Counts I and II.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff,
v. John Harris, Jr., Defendant S. C. No. 328981.

The said JOHN HARRIS, JR., is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of CRIMINAL SYNDICALISM, in Violation of Section 11401 (3), Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

That on or about the 25th day of May, 1966, at and in the County of Los Angeles, State of California, the said defendant, JOHN HARRIS, JR., did willfully, unlawfully and feloniously issue, circulate and publicly display certain papers, pamphlets, documents, posters and written and printed matter and other forms containing, and carrying written and printed advocacy of, teaching, aid and abetment of and advising criminal syndicalism, to wit: advocating terrorism and advising the commission of crime, sabotage and other willful and malicious damage and injury to property and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and affecting political

change. That said written and printed matter herein-before referred to is:

WANTED FOR THE
MURDER OF
LEONARD DEADWYLER:
(a member of the concentration camp)

“BOVA —the—COP”
(a guard in the concentration camp)

Bova is just one cop in the police department. They must all be wiped out before there is complete freedom. South Los Angeles—Watts is one big concentration camp in which its citizens are subject to systematic extermination.

- WE MUST LEARN TO DEFEAT THE ENEMY BEFORE WE ARE ALL EXTERMINATED.
- THE MEMBERS OF THE CONCENTRATION CAMP CAN BE WIPED OUT BY HUNGER ALSO. THAT'S WHY UNEMPLOYMENT IS HIGH.

South Los Angeles is a big industrial complex. There are factories that employ thousands right in the back-yards—(General Motors on Alameda and Goodyear on Central just to name two large ones)—of our homes. Black people make up 80% of the South L.A. area. Black people should make up 80% of the work force in the South L.A. area.

- WE SHOULD BE ABLE TO WORK WHERE WE LIVE.

The slogan should be raised:

- “IF 80% OF US DON'T WORK HERE, YOU DON'T PRODUCE”.

Production can be stopped.

Murder by cops and death by unemployment are methods of systematic extermination.

—THIS EXTERMINATION ISN'T GOING TO BE STOPPED BY GOING TO THE COURT OF THE EXTERMINATOR AS ADVISED BY SOME "NEGRO" POLITICIANS AND PREACHERS.

—GEORGE WASHINGTON AND THE AMERICAN REVOLUTIONARIES NEVER WENT TO KING GEORGE'S COURT. THE JEWS NEVER ASKED TO GO TO HITLER'S COURT.

—THE CONCENTRATION CAMP MUST DEVELOP ITS OWN COURT AND ITS OWN METHOD OF TRIAL....

These slogans must be raised:

"BRING PARKER, YORTY, AND BOVA TO TRIAL FOR MURDER—IN A COURT OF THE PEOPLE".

"DISARM THE GUARDS IN THE CONCENTRATION CAMP".

"IF 80% OF US DON'T WORK IN THE FACTORIES, YOU DON'T PRODUCE !!!"

Progressive Labor Party

399-6819

COUNT II

For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in COUNT I hereof, the said

JOHN HARRIS, JR.

is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of CRIMINAL SYNDICALISM, in Violation of Section 11401(3), Penal Code of California, a felony, committed prior to the finding of this indictment and as follows: That on or about the 26th day of May, 1966, at and in the County of Los Angeles, State of California, the said defendant,

JOHN HARRIS, JR.

did willfully, unlawfully and felonious issue, circulate and publicly display certain papers, pamphlets, documents, posters and written and printed matter and other forms containing, and carrying written and printed advocacy of, teaching, aid and abetment of and advising criminal syndicalism, to wit: advocating terrorism and advising the commission of crime, sabotage and other willful and malicious damage and injury to property and unlawful acts of force and violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control and affecting political change. That said written and printed matter hereinbefore referred to is:

THE NEED FOR REVOLUTION

“ . . . Shall the millions forever submit to robbery, to murder, to ignorance, and every unnamed evil which an irresponsible tyranny can devise, because the overthrow of that tyranny would be productive of horrors? We say not. The recoil, when it comes, will be in exact proportion to the wrongs inflicted; terrible as it will be, we accept and hope for it . . . ”

Frederick Douglass
—1856

There are 50,000 unemployed black workers in the South Los Angeles Area. Eighty per cent of the South L.A. area is black yet black people make up only some 5% of the jobs in factories right in the neighborhood like General Motors on Alameda and Goodyear on Central. Contrary to the lies preached by the capitalists and their apologists, 90% of the jobs in these factories can be done by illiterates. How much training does it take to put a wheel on a car in an assembly line or turn a bolt? The retraining program IS A FRAUD !!! Between 1960 and 1965 the average white family income in Los Angeles *rose* 14%—but the black family's income *fell* 8%. Every killing that happened at the hands of the cops during the August rebellion was ruled "justifiable homicide". Was it justifiable to shoot people in their apartments or anywhere?

Why?—The cops, Yorty, Parker, Brown, and the whole lot are paid to protect the interests of the rich white imperialists. Those who own factories like GM and Goodyear. South L.A. is a big industrial complex with enough jobs for everyone in the area. The national guard was really sent in to protect the big industries, not the small corner stores, liquor stores, and pawn shops.

It is these big industrialists and their spokesmen like Yorty and Brown who must be defeated.

They can't be defeated by pleading and begging. Any nation has the right to revolution and self-determination. REVOLUTION IS NECESSARY. They must be totally replaced. Revolution means a complete *overthrow* of the system. NO ACCOMMODATION !!

NO COMPROMISE. The community must be organized block by block. There must be a block leader for each 20 houses who organizes for defensive and offensive actions. Maps must be constructed of the whole neighborhood.

We must not fear revolution but we must welcome it.

"... Revolution is bloody, revolution is hostile, revolution knows no compromise, revolution overturns and destroys everything that gets in its way. And you, sitting around here like a knot on the wall, saying, I'm going to love these foks no matter how much they hate me. No, you need a revolution . . ."

Malcolm X

—1964

Welcome revolution—Organize for Revolution

Progressive Labor Party
399-6819 or WE 3-0463

WITNESSES

ALLAN K. ARCHBOLD

PIERCE BROOKS

JAMES HARRIS

S. I. HOLMES

CARLTON SULLIVAN

OLIVER TAYLOR

EARL THORSON

GEORGIA HAGA

A TRUE BILL

/s/ Averill H. Munger

Foreman of the Grand Jury

Presented by the Foreman of the Grand Jury, in the presence of the Grand Jury, in open Superior Court of the State of California, within and for the County of Los Angeles, and filed as a record in said Court this 20th day of September 1966.

William G. Sharp, County Clerk

By
Deputy

Evelle J. Younger
William E. McKesson, District Attorney
Bail Recommended

\$.....
Bail

REPORTER'S TRANSCRIPT OF GRAND JURY
PROCEEDINGS.

September 20, 1966.

The Grand Jury of the County of Los Angeles,
State of California.

* * *

The People of the State of California, Plaintiff, vs.
John Harris, Jr., Defendant. No. 328981.

APPEARANCES:

PATRICK T. McCORMICK

Deputy District Attorney of the County of Los
Angeles, representing the Office of the District
Attorney.

LOIS R. JOHNSON, duly appointed and sworn
as the official shorthand reporter of the Grand
Jury.

LOS ANGELES, CALIFORNIA, TUESDAY,
SEPTEMBER 20, 1966. 10:15

* *

(The Court Reporter, Lois R. Johnson, was duly
sworn by the Foreman as follows:

The Foreman: You do solemnly swear that you
will correctly take in shorthand and correctly trans-
cribe, to the best of your ability, all of the testi-
mony given by each and every witness testifying
in the matters now pending before this Grand
Jury, and that you will keep secret and divulge to
no one any of the proceedings of this Grand Jury,
so help you God?

The Reporter: I do.)

The Foreman: We have one defendant, John
Harris, Jr.

The matters to be considered: This case involves the named defendant, who on May 25th and 26th allegedly handed out leaflets entitled "Wanted for Murder, Bova the Cop," and "The Need for Revolution," to persons attending the Deadwyler inquest which was being held by the Los Angeles Coroner's Office on those dates.

It is alleged that these named leaflets advocate revolution and physical violence in an effort to bring about a political change. Allegedly, these acts were done in a climate in which a very real danger existed and physical violence and civil eruption were liable to occur.

Any member of the Grand Jury who has a state of mind in reference to the case, or to any of the parties involved, which would prevent him from acting impartially and without prejudice to the substantial rights of any of the said parties will now retire.

Mr. McCormick.

The Foreman: Who is your first witness?

Mr. McCormick: Mr. Earl Thorsen.

The Sergeant at Arms: Mr. Thorsen, please.

Right by that chair, sir.

EARL THORSEN,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.
(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

Mr. McCormick: At this time, Mr. Foreman, may I mark these exhibits?

I have two leaflets which are stapled together. The first page bears a likeness of former Chief Parker, Los Angeles Police Department, and the legend "Wanted for Murder, Parker the Copy (sic) in Watts, Progressive Labor Party."

The second page is a text entitled "The Need for Revolution."

May these two leaflets as stapled together be marked Grand Jury 1?

The Foreman: We will mark them No. 1.

Mr. McCormick: I have a second leaflet which begins "Wanted for Murder of Leonard Deadwyler, a member of the concentration camp, Bova the Cop, a guard in the concentration camp."

May this leaflet be marked Grand Jury 2?

The Foreman: We will mark it No. 2.

Mr. McCormick: I have a photograph that bears the number 28 and a date 5-26-66. It indicates a male Negro standing on some steps holding in his right hand what appears to be Exhibit 1.

May this photograph be marked Grand Jury 3?

The Foreman: We will mark it No. 3.

Mr. McCormick: I have another photograph which bears the date 5-20-66 and a number 7. It appears to be a photograph of the same person depicted in Grand Jury 3. And in this photograph he appears to be standing in the hallway with numerous other persons.

May this be marked Grand Jury 4?

The Foreman: We will mark it No. 4.

Mr. McCormick: And I have another photograph depicting a male Negro person with leaflets over the left

arm standing in what appears to be a doorway at the top of some stairs.

May this be marked Grand Jury 5?

The Foreman: Mark that No. 5.

EXAMINATION

By Mr. McCormick:

Q Mr. Thorsen, what is your business or occupation, sir?

A At the present time I am a fingerprint expert, but at the time the photographs were taken I was a senior photographer assigned to the SID section of the Los Angeles Police Department.

Q You are employed by the Los Angeles Police Department?

A Yes, I am.

Q Looking at the three photographs which have been marked 3, 4 and 5, do you recognize any one or more of those photographs?

A Yes, I recognize one.

Q Which one is that, sir?

A Exhibit No. 4.

Q And did you take that photograph?

A Yes, I did.

Q And when and where did you take the photograph?

A I took it on the 20th of May in the new court building.

Q That is, the new Courthouse here in the City of Los Angeles?

A City of Los Angeles.

Q And what is depicted in that particular exhibit?

A Well, it shows a Negro man with a paper in his hand, numerous other people behind him. He is in the foreground.

Q And that was in the interior of the Courthouse?

A Yes, sir; it was.

Q Was there anything going on at the Courthouse that caused you to be there at that time?

A Yes. It was during the Deadwyler investigation.

Mr. McCormick: Nothing further from this witness.

The Foreman: Thank you for coming, sir. You are excused.

Mr. McCormick: Mr. Sullivan.

The Sergeant at Arms: Mr. Sullivan, please.

Over by that green chair.

CARLETON SULLIVAN,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.

(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

By Mr. McCormick:

Q Mr. Sullivan, what is your occupation, sir?

A Photographer.

Q By whom are you employed?

A City of Los Angeles, the Los Angeles Police Department.

Q Were you employed in that capacity during May of this year?

A Yes, I was.

Q Mr. Sullivan, in front of you are three photographs. Would you look at these three photographs, please.

(Witness complies.)

Q Do you recognize one or more of those photographs?

A Yes, I do; two of them.

Q Which ones do you recognize? They are marked as exhibits, I believe.

A Exhibit 3 and Exhibit 5.

Q And did you take those photographs, sir?

A Yes, I did.

Q In regard to Exhibit 3, would you tell this Grand Jury when and where you took that photograph?

A It was on the steps of the Courthouse on May 26th.

Q That is, the Los Angeles Courthouse situated here in downtown Los Angeles?

A Yes.

Q And was there anything being heard at the Courthouse at that time that occasioned you being there?

A The Deadwyler inquest was in session.

Q And regarding the other photograph—is that 5?

A Yes.

Q Did you take that photograph?

A Yes, I did.

Q When and where did you take that photograph?

A On the steps in front of the Courthouse during the Deadwyler trial.

Q And what date?

A May 23rd.

Q Of this year?

A Yes.

Mr. McCormick: No other questions.

The Foreman: Thank you for coming, sir.

Mr. McCormick: This is Georgia Haga. She is a substitute for Mr. Warren.

GEORGIA HAGA,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.
(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Foreman: Sit right here.

The Witness: Shall I get them out, sir?

The Foreman: Talk right into the microphone, please.

The Witness: Yes, sir.

EXAMINATION

By Mr. McCormick:

Q Mrs. Haga, what is your occupation, please?

A I am a customer service supervisor for the General Telephone of California.

The Foreman: May we have the spelling of her name, please?

Q By Mr. McCormick: May we have the spelling of your name?

A Yes, sir. H-a-g-a, my last name.

Q Your first name is Georgia?

A Georgia.

Q Do you have the files and records of the company by which you are employed for a telephone number 399-6819?

A Yes, sir.

Q And are those records kept under your supervision?

A Yes, sir.

Q Do your records indicate who the subscriber is for that telephone number?

A Yes, sir.

Q Who is the named subscriber?

A John Harris.

Q And do the records indicate the address at which that telephone is located?

A They do.

Q And what is the address?

A 22½ Thornton Avenue, Venice.

Q When was the number first subscribed to by Mr. Harris?

A On December 10, 1965, it was installed. It was requested on the same day—on the 6th, I beg your pardon.

Q Is that telephone number 399-6819 being used at the location you gave us still?

A That's right.

Q Is Mr. John Harris still the subscriber?

A Yes, sir.

Mr. McCormick: I have nothing further.

The Foreman: You are excused, and thank you for coming.

Mr. McCormick: James Harris.

The Sergeant at Arms: James Harris, please.

Over by that green chair, sir.

JAMES HARRIS,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.
(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do, sir.

The Foreman: Would you have a chair, please.

EXAMINATION

By Mr. McCormick:

Q Mr. Harris, what is your occupation?

A I am a detective with the District Attorney's Intelligence Detail.

Q That is the District Attorney of Los Angeles County; is that right?

A Yes, sir; it is.

Q Were you so employed during May of 1966?

A Yes, sir.

Q And during May of 1966, did you attend the inquest into the death of Leonard Deadwyler which began on May 19th?

A Yes, sir; I did.

Q And before you are three exhibits which have been marked Grand Jury's 3, 4 and 5. Would you examine those exhibits, please?

(Witness complies.)

Q Have you examined them?

A I have, sir.

Q Looking at the person depicted in the photograph, Grand Jury 3, do you recognize that person?

A I do, sir.

Q And what is the name of that person, sir?

A That is John Wesley Harris, Jr.

Q And the picture, Grand Jury 4, have you examined it?

A I have, sir.

Q Now, there is a person prominent in the foreground wearing a white shirt.

Do you recognize that person?

A Yes, sir.

Q And who is that?

A That's also John Wesley Harris, Jr.

Q And the photograph, Grand Jury 5—

A This is 5.

Q —the person depicted there wearing the dark glasses with the leaflets over his arm, do you recognize that person?

A I do, sir.

Q Who is that, sir?

A John Wesley Harris, Jr.

Q Have you ever observed Mr. Harris at any residence here in Los Angeles County?

A No, sir; not directly at his residence. I know where he resides.

Q How do you know that, sir?

A As a result of an investigation which we have conducted.

Q Conducted by you?

A Yes, sir.

Q Personally?

A Yes, sir.

Q And what address have you associated him with?

A 22½ Thornton Court, Venice, California.

Q Mr. Harris, I have an exhibit which has been marked Grand Jury 1.

Would you examine that, please?

(Witness complies.)

Q Have you seen that before?

A Yes, sir; I have.

Q Did you receive the exhibit from any person?

A I did, sir.

Q And when and where did you receive it?

A On the steps of the County Courthouse on 26 May, 1966, from John Harris, Jr.

Q That is the person depicted in photographs 3, 4 and 5?

A Yes, sir; it is.

Q And for the record, would you describe and read the text of that exhibit, please.

A The first sheet is a picture of former Chief Parker, Los Angeles Police.

Across the top is printed "Wanted for Murder," and across the bottom "Parker the Cop in Watts, Progressive Labor Party."

The appended sheet states, headed "The Need for Revolution."

And then in quotes:

" . . . Shall the millions forever submit to robbery, to murder, to ignorance, and every unnamed evil which an irresponsible tyranny can devise, because the overthrow of that tyranny would be productive of horrors? We say not. The recoil, when it comes, will be in exact proportion to the wrongs inflicted; terrible as it will be, we accept and hope for it . . . "

That is signed "Frederick Douglass, 1856."

Then the text begins:

"There are 50,000 unemployed black workers in the South Los Angeles area. 80 per cent of the South L. A. area is black yet black people make up only some 5 per cent of the jobs in factories right in the neighborhood like General Motors on Alameda and Goodyear on Central. Contrary to the lies preached by the capitalists and their apologists, 90 per cent of the jobs in these factories can be done by illiterates. How much training does it take to put a wheel on a car in an assembly line or turn a bolt. The restraining program is a fraud.

"Between 1960 and 1965 the average white family income in Los Angeles *rose* 14 per cent—but the black family's income *fell* 8 per cent.

"Every killing that happened at the hands of the cops during the August rebellion was ruled 'justifiable homicide.' Was it justifiable to shoot people in their apartments or anywhere?

"Why?—The cops, Yorty, Parker, Brown, and the whole lot are paid to protect the interests of the rich white imperialists. Those who own factories like GM and Goodyear. South L. A. is a big industrial complex with enough jobs for everyone in the area. The National Guard was really sent in to protect the big industries, not the small corner stores, liquor stores and pawn shops.

"It is these big industrialists and their spokesmen like Yorty and Brown who must be defeated.

"They can't be defeated by pleading and begging. Any nation has the right to revolution and self-determination. *Revolution is necessary.*" This phrase is underlined. "They must be totally re-

placed. Revolution means a complete *overthrow*," which is underlined, "of the system. *No accommodation!! No Compromise!!*" Those phrases are underlined. "The community must be organized block by block. There must be a block leader for each 20 houses who organizes for defensive and offensive actions. Maps must be constructed of the whole neighborhood.

"We must not fear revolution but we must welcome it."

Then in quotes:

"... Revolution is bloody, revolution is hostile, revolution knows no compromise, revolution overthrows and destroys everything that gets in its way. And you, sitting around here like a knot on the wall, saying, I'm going to love these folks no matter how much they hate me. No, you need a revolution . . ."

That quote is signed "Malcolm X, 1964."

"Welcome revolution—organize for revolution."

Signed "Progressive Labor Party."

Telephone "399-6819 or WE. 3-0463."

Q Now, we have an exhibit marked Grand Jury Exhibit 2.

Would you examine it, please.

(Witness complies.)

A I have examined it.

Q Have you seen that exhibit before?

A Yes, sir; I have.

Q And did you receive that exhibit at some time and place?

A I did, sir.

Q When and where did you receive it?

A I received this from John Wesley Harris, Jr., on the 25th of May, 1966.

Q Where was that, sir?

A At the County Courthouse during the Deadwyler inquest.

Q And is that the same person you referred to as depicted in the photographs?

A It is, sir.

Q Would you describe and read that text, please.

A This is mimeographed on a yellow legal size piece of paper and it states across the top, "Wanted for the Murder of Leonard Deadwyler:—(A member of the concentration camp) 'Bova-The-Cop' (A guard in the concentration camp)."

"Bova is just one cop in the police department. They must be all wiped out before there is complete freedom. South Los Angeles-Watts is one big concentration camp in which its citizens are subject to systematic extermination.

"We must learn to defeat the enemy before we are all exterminated.

"The members of the concentration camp can be wiped out by hunger also. That's why unemployment is high.

"South Los Angeles is a big industrial complex. There are factories that employ thousands right in the backyards—(General Motors on Alameda and Goodyear on Central just to name two large ones)—of our homes.

"Black people make up 80 per cent of the South L. A. area. Black people should make up 80 per cent of the work force in the South L. A. area.

"We should be able to work where we live.

"The slogan should be raised:

"'If 80 per cent of us don't work here, you don't produce.' Production can be stopped.

"Murder by cops and death by unemployment are methods of systematic extermination.

"This extermination isn't going to be stopped by going to the court of the exterminator as advised by some 'Negro' politicians and preachers.

"George Washington and the American Revolutionaries never went to King George's court for justice. They smashed King George's court. The Jews never asked to go to Hitler's court.

"The concentration camp must develop its own court and its own method of trial.

"These slogans must be raised: 'Bring Parker, Yorty, and Bova to trial for murder—in a court of the people.'

"'Disarm the guards in the concentration camp.'

"'If 80 per cent of us don't work in the factories, *you* don't produce!!!'"

It is signed "Progressive Labor Party."

The telephone number is listed "399-6819."

Q I believe you indicated you received that yourself from John Harris on May 25th of this year?

A 25th, yes, sir.

Q And during the time you attended the inquest, did you see Mr. John Harris, Jr., at the Courthouse where the inquest was being held?

A Yes, sir.

Q On what dates at this time do you recall seeing him there?

A I recall seeing him on the 20th, the 23rd, the 25th and the 26th of May, 1966.

Q And in addition to the fact that you received these leaflets from him, did you see whether or not he was handing them out to other people?

A Yes, sir; he was.

Q And these other persons, were they people that were there to attend the inquest?

A Yes, sir; they were.

Q And ou yourself observed him handing the leaflets, Grand Jury 1 and 2, to these persons?

A I did, sir.

Mr. McCormick: No other questions of this witness.

The Foreman: Thank you for coming, sir.

Mr. McCormick: Lieutenant Brooks.

PIERCE BROOKS,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.
(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

EXAMINATION

By Mr. McCormick:

Q Sir, would you state your occupation, please?

A Yes, sir. I am a lieutenant of police for the City of Los Angeles.

Q Now, Lieutenant Brooks, on August 11th of 1965, did an emergency situation arise in the Watts area of Los Angeles?

A Yes, sir.

Q And did you in your capacity as a lieutenant of the Los Angeles Police Department have a specific assignment in regard to that situation?

A Yes, sir. At that time I was assigned to Homicide Division and one of my collateral duties was supervisor of investigations and one of the duties involving supervisor of investigations is to investigate shootings in which officers are involved throughout the City of Los Angeles.

When the riots started, it became very obvious that the decentralized geographic divisions wouldn't be able to handle all the load; they had other problems; and therefore we made a decision and Homicide Division then investigated all the acts of violence and the deaths that occurred during the riot and due to my position I became the coordinator and acted as such in the inquest that followed a month later.

Q From your statement, I take it, then, that this emergency situation was what has now been termed as the August riots of 1965?

A Yes, sir; in Watts.

Q And how long did that riot condition exist, sir?

A It began on August 11, 1965, and our emergency control central was deactivated eight days and 22 hours later. However, there were still an extra amount of police officers and National Guard troops in the area for almost a period of two weeks.

Q What was the area involved in those riots?

A Forty-six square mile area of which 34.4 square miles were in the City of Los Angeles.

Q And what was the number of the Los Angeles Police Department personnel assigned to the riot situation?

A The maximum commitment in the field, at peak—during the peak was 934 officers at one time. That is, uniformed policemen in the riot area at one time.

Q And you mean actually on duty at one time?

A Yes, sir; in the area—that did not include—of course, half of the department was on duty at the time, but these were just officers in the field. This would, to give you an example, in this particular area on a normal night it would take maybe 115 officers to patrol this area.

Q Now, were there any special problems which the Los Angeles Police Department had regarding departmental operations because of the riots?

A Yes. The department was reorganized in that we went on 12-hour shifts, that is, half the people working for half a day and in the last 12 hours it would be the other half of the department. This necessitated in cancelling all days off and many officers came in for their vacations—from their vacations who were on vacations and spending them locally. They came back in. There were—on the conclusion of the riots it was determined that 17,000 man days of overtime were worked by Los Angeles Police Officers during this period of slightly over a week.

Q As a result of the riots, was there any property damage?

A Yes, sir; there was.

Q What was the total property damage?

A It's been estimated at approximately \$40,000,000.

Q And that is from your records that you kept in your capacity as lieutenant of police?

A Yes, sir. All the records and statistics were available to me and are; yes, sir.

Q Was there any damage to the Los Angeles Police Department property?

A Yes, sir.

Q What was that total damage?

A Primarily all to police vehicles.

Q What was the total in dollars and cents, if you know?

A It has been estimated to be \$7,492 done to police vehicles of the Los Angeles Police Department.

Q And those figures, I take it, are from the records of the Los Angeles Police Department?

A Yes, sir.

Q During the riots, did your records reflect whether there were any weapons stolen?

A Yes, sir. There were 851 guns stolen during the riot. The breakdown is 174 rifles, 286 shotguns, and 391 hand guns were stolen during the riot.

Q And do the records indicate how many arrests were made during the riots?

A Yes sir. A total of 3,927 arrests were made in connection with the riots.

Q And also from your records, is there an indication as to how many Los Angeles Police Department officers were injured during the riots?

A Ninety police officers reported injuries.

Q And were there any other agencies involved in policing the riots?

A Yes, sir.

Q What were they?

A The National Guard and the Los Angeles Sheriff's Office, both fire departments from Los Angeles City and County; Santa Monica Police Department sent a detail of men, California Highway Patrol and

the Los Angeles Marshal's Office had men in the riot area assisting us.

Q And were there any of those personnel from other agencies injured?

A Yes, sir; 136 firemen from the City of Los Angeles were injured; 34 of these firemen were injured by rioters, three of them were shot. Ten National Guardsmen were injured and 23 officers of the other agencies were injured during the rioting.

Q Were there any of those personnel—I take it now official personnel, firemen, policemen, National Guardsmen, were there any killed?

A Yes, sir; three.

Q And who were they? I mean what agency.

A One Los Angeles City fireman, one Long Beach police officer and one Deputy Sheriff from the County of Los Angeles.

Q I take it all these figures are from the records that you have under your supervision from your capacity with the police department?

A Yes, sir; that is correct.

Q And they are kept in the normal course of business by the Los Angeles Police Department?

A Yes, sir.

Q Were there any civilians injured during the riots, Lieutenant?

A 1,032 civilians reported that they were injured in various ways.

Q And were there any deaths to civilians?

A Yes, sir.

Q How many?

A Thirty-one.

Q Directly attributable to the riots?

A Yes, sir.

Mr. McCormick: Nothing further.

The Foreman: Thank you for coming, sir.

We will have a short recess.

(Recess taken.)

Mr. McCormick: Lieutenant Archbald.

ALLEN K. ARCHBALD,
called as a witness before the Grand Jury, was duly
sworn as follows:

The Foreman: Would you raise your right hand.

(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

EXAMINATION

By Mr. McCormick:

Q Sir, what is your occupation?

A Police officer for the City of Los Angeles, assigned to 77th Street Division.

Q What is your rank?

A Lieutenant.

Q And what is your particular assignment, Lieutenant?

A At the present time I am in charge of the Vice Detail.

Q And formerly in, let us say, March of 1966, what was your assignment?

A Up to March 15th I was in charge of the vice

assignment at 77th Street. Later on in the afternoon of March 15th I was put in the field in uniform.

Q That was on March 15th of this year?

A Yes, sir.

Q Was there a particular reason on that date at that time why you were put back in uniform and put into the field?

A Yes, sir.

Q What was that, sir?

A We had a riot.

Q And 77th Division, that is a division of the Los Angeles Police Department; is that right?

A That is correct, sir.

Q What area is policed by the 77th Division?

A Roughly we handle everything in the city south of Slauson to the San Diego Freeway from the east County line to roughly the west County line, except where we adjoin University Division along Western Avenue.

Q That is generally the southern portion of the City of Los Angeles?

A Yes, sir.

Q Does 77th Division encompass the area known as Watts?

A Yes, sir.

Q Now, you say on March 15th of this year a riot arose in the area?

A Yes, sir.

Q How long did that riot situation exist then?

A It started on March 15th and reached major proportions probably about 7:00 o'clock that evening and then it descended and ceased in activity on the afternoon of the 16th when we secured our details.

Q And your particular assignment at that time was a supervisor in the field?

A Yes, sir.

Q What was the area, involved, Lieutenant?

A Roughly the Watts area which extends on the west—it is bounded on the west by Central Avenue, on the south by Imperial, on the east by the County line, which is roughly just a few blocks west of Alameda Street, and on the north by 92nd Street.

Q And because of this riot situation, did you initiate special departmental operations?

A Yes, sir; we did.

Q What was that, sir?

A The calling in of additional officers from City side divisions.

Q You increased your personnel?

A That we did, sir.

Q Was there any property damage occasioned by this riot?

A Yes, sir.

Q Do you have any idea of the total property damage?

A No, sir; I don't. We have it documented, but I don't have those figures. There were a number of businesses that had been broken into, looted, several cases of arson, as well as personal attacks on individuals.

Q Was there any damage to Los Angeles Police Department property?

A Yes, sir. There were some police vehicles damaged.

Q You don't have at this time in your records the total of the amount done to police vehicles?

A Not for the 15th and 16th; no, sir.

Q Were there any personnel of the Los Angeles Police Department injured?

A During the two days?

Q Yes.

A 15th and 16th?

None seriously, but there were minor injuries.

Q Were there any deaths that arose during this riot?

A Police or civilians, sir?

Q Any deaths?

A Yes, sir; two.

Q They were to civilians?

A Yes, sir.

Q And they arose during the riots?

A Yes, sir.

Q Do you have personal knowledge whether during these riots on the 15th and 16th of March of this year there were any weapons stolen by persons participating in the riots?

A Not stolen during the 15th and 16th, no, sir, I do not.

Q Now, in your capacity as a lieutenant at the 77th Division from your personal experience, Lieutenant Archbald, since August of 1965 have there been occasions when groups of people in the area which you police have attacked police officers in the course of their duties?

A Yes, sir.

Q And from your personal experience again and knowledge, since August has that number changed any, the number of attacks on police officers?

A Yes, sir.

Q And would you say it is increasing or decreasing?

A It is increasing, sir.

Q And that is a steady increase from August of '65 to let's say May of '66?

A As of August of '66; yes, sir.

Q And how many officers are assigned to the patrol division of the 77th Division?

A We have approximately 200 uniformed officers that work the radio cars in the field.

Q And of your own knowledge, do you know whether any of those officers have been injured this year, 1966, because of action taken against them by groups of people during the course of their duties?

A Yes, sir.

Q Do you have knowledge of how many officers have been injured?

A There have been officers injured to varying degrees. There has been a total since January up until the close of August of 113 assaults on police officers in our division.

Q These are by groups of people while the officers were performing their duties?

A By groups or by individuals; yes, sir.

Q And from your own experience, again, have any of these assaults on police officers followed a pattern?

A Yes.

Q And you understand what I mean by pattern, what you would refer to as an MO, a modus operandi?

A Yes, sir.

Q Would you describe that for me, please.

A There have been several. One that gave us quite a bit of trouble was in the one housing project, a lookout to be stationed in the street, apparent casual person just leaning against a wall, perhaps. Upon a police

car's approach, there would be a signal given by this lookout and from behind the walls of the project the police car would be subjected to a heavy barrage of rocks, bottles, whatever could be thrown at them.

Q And you say this particular procedure has been done on numerous occasions?

A Been repeated very many times, sir; yes, sir.

Q And this type of activity of action directly against officers, that has been on the increase?

A Yes, sir.

Q During police riots occurring on the 15th and 16th of March, was there any gunfire directed toward the officers?

A Yes, sir.

Q On several occasions during those two days?

A On the one occasion I can testify on my own knowledge at approximately 6:20 or 6:30 P.M. of March 15th at 103rd and Wilmington I was present. There were about 20 officers. We were subjected to quite a bit of gunfire. There was one civilian killed at that location.

Q During this firing?

A Yes, sir; not by a police weapon.

Q Do you recall the name of that civilian?

A No, sir; I don't.

Mr. McCormick: No other questions.

The Foreman: Thank you for coming, sir.

The Witness: Thank you.

Mr. McCormick: Captain Holmes.

The Sergeant at Arms: Captain Holmes, please.

By the green chair, there.

S. I. HOLMES,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.
(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Foreman: All right, sir.

EXAMINATION

By Mr. McCormick:

Q Sir, what is your occupation?

A I am the captain in the Los Angeles County Sheriff's Office.

Q Captain Holmes, in regard to the Los Angeles County Coroner's inquest into the death of Leonard Deadwyler, which began on May 19th of 1966, did you receive any special assignment in your capacity as captain in the Sheriff's Department?

A Yes, sir. I was called downtown to handle the crowd control in the buildings and the halls.

Q And you were the supervisor of the personnel from the Sheriff's Department assigned to crowd control?

A Yes, sir.

Q Where was the hearing first set to be heard, sir?

A On the first day was on May 19th. The hearing was set in Room 501 of the old Hall of Records.

Q Did it take place, that is, the hearing, at that location?

A Yes, sir; it did take place. However, it was changed because of the crowd and it was moved to Department 12 in the Courthouse.

Q And that move was occasioned by the crowd in attendance?

A That's right; yes, sir.

Q What time was the change made from the original place for setting to the Courthouse?

A The change was made at approximately 11:00 o'clock.

Q A.M.?

A A.M., yes, sir.

Q And originally on May 19th what was the number of Sheriff's personnel assigned to crowd control, sir?

A At 8:30 in the morning we started off with one lieutenant, one sergeant and eight deputies to handle the Room 501 in the Hall of Records with six deputies as a standby. By 9:30 we had already put the six standby deputies into the hearing room and at 10:50 we added two more sergeants and 20 deputies to handle the crowd in the hall. After the case was moved in the afternoon to the Courthouse, we added—let me see, it was another 74 deputies. These were all to be deployed in the halls outside of the Courtroom.

Q What was the behavior of the crowd at the original place set for hearing, sir?

A Well, the behavior of the crowd changed. Starting at—approximately—about 9:00 o'clock, there were originally 150 approximately there. Then as the crowd gathered—this 150 was rather well-behaved and quiet.

But as the crowd gathered, it picked up an emotional tension and became quite unruly, pushing and trying to get into the courtroom, filled the halls in the old Hall of Record, clear to the elevators, and as one woman fainted they kept trying to push in and there was a lot of comments, talk and so forth.

Q And then what was the last date of the hearing, Captain?

A The last day, I believe, was May 31st.

Q And I take it each day of the hearing you had your personnel there on crowd control; is that right?

A That's right.

Q What was the total personnel you were using in crowd control in the new courthouse?

A It varied from day to day, but normally the average would be—or rather I would say the largest number we used would be—we had 27 men inside of the courtroom; we had 60 men, and these are all uniformed deputies, 60 uniformed deputies in the hall for the control of the crowd in the hall. And then we maintained 180 standby personnel, also uniformed personnel, and 30 plainclothes personnel. These people were used at different times.

Q Now, did an occasion arise when it became necessary to—for you to direct your sheriff's personnel to take action against the crowd?

A Yes, sir; it did. We were required to move a large crowd from the halls in the Courthouse.

Q What date was that, sir?

A This was on Friday, May 20th. Happened at approximately 11:00 o'clock.

Q And this was by physical action that deputies moved these people?

A Yes, sir.

Q Prior to that, had there been any request made for them to move, or clear the hallway?

A Yes, sir. There had been a request made by Assistant Chief Cully of the Los Angeles Fire Department. The crowd was blocking the halls and did provide a hazard and—a fire hazard as well as—well, there was just no traffic within the hall at all. It was completely blocked. He made an announcement through a hand amplifier, hand mike, and asked first that they disperse, and talked to them for two or three minutes in trying to talk them out, and there were continual cat-calls and talks that they were not going to leave until they were admitted into the courtroom. And Chief Cully continued to talk to them and told them at that time that if the crowd didn't move and didn't disperse that they would be moved by Sheriff's personnel.

Q When he made that announcement, did they move?

A No, sir. There was the continual cat-calls and statements, repeated statements by many of the people in the crowd that they had no intentions of moving and weren't going to move.

Q Did you then direct your Sheriff's personnel to move them out of the hallway?

A Yes, sir; I did.

Q What was the average attendance by persons attending the inquest? What was the average number, Captain?

A We had 152 seats in the courtroom. Now, I am talking about in Department 12. There were 152 seats for spectators which were always filled. And we had varying crowds outside. It went up to two and three hundred people or more.

Q And were you able to estimate the ethnic make-up of the crowd?

A Yes, sir. The ethnic makeup originally was about 90 per cent colored, 10 per cent Caucasian on the first day. It moved from there to between 80 and 85 per cent colored and the rest Caucasian during the remaining days of the trial.

Mr. McCormick: I have nothing further.

The Foreman: Thank you for coming, sir..

Mr. McCormick: Mr. Taylor.

The Sergeant at Arms: Mr. Taylor, please.

Right over there by that green chair, sir.

OLIVER TAYLOR,

called as a witness before the Grand Jury, was duly sworn as follows:

The Foreman: Would you raise your right hand.

(Witness complies.)

The Foreman: You do solemnly swear that the testimony you are about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Foreman: Will you have a chair here.

EXAMINATION

By Mr. McCormick:

Q Sir, what is your occupation?

A Sergeant with the Los Angeles County Sheriff's Department.

Q And Sergeant Taylor, did you have a special assignment in your capacity as Sergeant of the Los Angeles County Sheriff's Department durng the Dead-

wyler inquest which was held from May 19th to May 31st of this year?

A Yes, sir; I did.

Q And it is my understanding that the inquest from the date of the May 20th was held in the new Courthouse in Department 12; is that correct?

A Yes, sir.

Q That was the inquest inquired into by the Los Angeles County Coroner regarding the death of Leonard Deadwyler?

A Yes, it was.

Q Who allegedly met his death from a gun in the hands of a Los Angeles police officer whose last name was Bova?

A Yes, sir.

Q Now, what was your assignment during the inquest, sir?

A The start of the inquest on the 19th of May, a Thursday, I was to supervise the uniformed deputies who were sent to the old Hall of Records in crowd control and maintaining order within the hearing room.

Q And were you in the old Hall of Records on the 19th?

A Yes, sir.

Q Did you have any problems with the crowd?

A Yes, sir; we had a great deal of problems.

Q And what type of problem was that, sir?

A We had difficulty maintaining order outside the hearing room because of the large number of people there demanding entrance. We could not maintain order. We could not quiet the crowd down. And ultimately the hearing was suspended at that point and transferred to the new Courthouse.

Q And when the hearing was resumed, was it resumed in Department 12 of the new Courthouse?

A Yes, it was.

Q And did you have an assignment there?

A I did.

Q What was that, sir?

A Again it was to supervise the uniformed personnel within the courtroom. My assignment was the supervision of one half of the personnel within the courtroom on the one side of the courtroom.

Q Now, do you know the number of spectators within the courtroom?

A I could answer only that the seating capacity, or the total number that were there—

Q What was that?

A The seating capacity of the courtroom itself is 252. There were a certain number of seats set aside for press, guests and witnesses. The remaining 152 seats were left to be occupied by spectators.

Q And were they occupied each day during the course of the inquest?

A Yes, they were.

Q And during the course of the inquest, were you able to estimate the ethnic makeup of the spectators?

A I was.

Q What was that?

A The first day of the inquest it was my estimation that the makeup of the spectators was at least 90 per cent Negro, 10 per cent Caucasian, Mexican-American. The makeup of the spectators remained about the same, although it did—the amount of the Negro spectators did diminish toward the end of the inquest. I don't believe it ever got below 80 to 85 per cent Negro.

Q Now, before you are two exhibits which have been marked Grand Jury's 1 and 2. Do you see them, the leaflets?

A I do.

Q Now, referring to the leaflets which are joined together, which have been marked Grand Jury Exhibit 1, during the course of these inquests at any time did you observe that particular item, the exhibit Grand Jury 1 within the courtroom?

A Yes, I did.

Q What was the occasion in which you observed these leaflets?

A I observed the leaflets, such as this, carried by the spectators within the courtroom.

Q And regarding the exhibit Grand Jury 2, during the inquest did you ever see that exhibit within the courtroom?

A Yes, I did.

Q And what was the occasion in which you observed that exhibit or exhibits similar to it?

A These also were being carried by members of the spectators.

Q Now, within the courtroom itself, did any of the number of spectators indicate by their actions any feeling or demeanor?

A Yes, they did.

Q What were those occasions?

A On several occasions some of the spectators approached both myself and other officers within the courtroom and threatened them.

Q Threatened them? In what manner would they speak? Do you recall any occasions?

A Yes. One specifically that comes to mind, one individual approached two deputies who—uniformed

deputies who were working under my direction and he advised them that they—in effect, he told them that they shouldn't turn their backs on him because if they did that he would kill them.

Q Who was making that statement, a spectator?

A A spectator, yes.

Q And did this happen on numerous occasions, that manner of speaking toward the deputies?

A Several occasions, two to three that I witnessed personally.

Q During the course of the testimony, were there any audible comments from the spectators?

A Yes, sir.

Q And what was their demeanor at that time?

A During the testimony by various witnesses, if they seemed to be pleased by the comments made by the witness, there would be cheers or shouts of glee. If they were unhappy or displeased with the testimony, then there would be oohs and ahhs of disbelief. That's the way I interpreted the sounds.

Q Based upon your observation, did the spectators appear to be in an emotional state during the course of the inquest?

A Yes, sir.

Mr. McCormick: I have nothing further of this witness.

Nothing further.

The Foreman: We have some more.

Q By Mr. McCormick: Now, while you were assigned as Sergeant in charge of the Sheriff's personnel within the courtroom, did the crowd indicate hostility towards the police personnel?

A Yes, they did.

Q That was the entire crowd as a group?

A No, I wouldn't say the entire crowd. I would say a vast majority of the crowd.

Mr. McCormick: Nothing further.

The Foreman: All right, sir. You are excused. Thank you for coming.

Mr. McCormick: That concludes the evidence.

LOS ANGELES, CALIFORNIA, TUESDAY, SEPTEMBER 20, 1966. 12:00

* *

(The following proceedings were had in Department 100 of the Superior Court, before the Honorable Arthur L. Alarcon, Judge Presiding:)

The Court: I note, Mrs. Bancroft, that the 1966 Grand Jury is present in the courtroom.

Will you call the roll of the Grand Jury, please.

The Clerk: Yes, your Honor.

(Whereupon the Clerk called the roll of those Grand Jury members present.)

The Clerk: Eighteen Grand Jurors answer present, your Honor.

The Court: Thank you, Mrs. Bancroft.

Mr. Munger, does the Grand Jury have an Indictment to return to the Court?

The Foreman: We do, your Honor.

The Court: Would you hand it to the Bailiff, please.

(The Foreman complies.)

The Court: The Bailiff has handed me one Indictment, apparently in two Counts.

Mr. Munger, in the deliberations on this Indictment, did at least 14 of the Grand Jurors participate in all the deliberations?

The Foreman: They did, your Honor.

The Court: And of those 14 or more Grand Jurors who participated in all of the deliberations, did at least 14 vote for the return of this Indictment?

The Foreman: At least 14 did, your Honor.

The Court: Thank you, Mr. Munger. Be seated.

The Court finds the Indictment to be a True Bill. The Clerk is ordered to file this Indictment. A bench warrant is ordered to issue for the apprehension of the defendant. Bail on the bench warrant will be fixed as recommended by the Grand Jury, plus the penalty assessment.

Is Mr. Howard here?

Mr. Howard: Yes, your Honor.

The Court: Is this defendant in custody, Mr. Howard?

Mr. Howard: No, your Honor. May we ask for an immediate bench warrant to be picked up by representatives of the District Attorney's Office.

The Court: Yes. All right. The bench warrant is ordered to be processed and ten turned over to the District Attorney's Office investigators for service.

All right, thank you very much.

(Whereupon the proceedings were concluded.)

Certificate.

The Grand Jury of the County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. John Harris, Jr., Defendant. No. 328981.

State of California, County of Los Angeles—ss

I, LOIS R. JOHNSON, Official Court Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that I was, on the 20th day of September, 1966, appointed and sworn to report all the testimony and proceedings had in the above-entitled matter before the Grand Jury of Los Angeles County; that the foregoing pages 1 through 48, inclusive, are a true and correct transcript of my Stenotype notes and a full, true and correct statement of said testimony and proceedings.

Dated this 28th day of September, 1966.

Lois R. Johnson
Official Reporter

FILE COPY

FEB 11 1964
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 4 2

EVELLE J. YOUNGER,
vs.
JOHN HARRIS, JR., et al.,

Appellant,
Appellees.

**APPELLANT'S SUPPLEMENTAL
BRIEF ON REARGUMENT**

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In the Supreme Court
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OCTOBER TERM, 1969

No. 4

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., et al.,

Appellees.

APPELLANT'S SUPPLEMENTAL
BRIEF ON REARGUMENT

SUMMARY OF ARGUMENT

Dombrowski v. Pfister, 380 U.S. 479 (1965), does not authorize federal intervention in this case. Appellees Dan, Hirsch, and Broslawsky, the district court found, stand in no danger of prosecution under the California Criminal Syndicalism Act. The mere existence of an arguably vague and overbroad state statute regulating expression or association does not create an actual case or controversy within the meaning of Article III, section 2 of the United States

Constitution. *Golden v. Zwickler*, 394 U.S. 103 (1969). The district court, therefore, exceeded its jurisdiction in reviewing separate and severable sections of the Syndicalism Act not involved in the prosecution of appellee Harris.

The district court erred in declining to abstain from declaring unconstitutional that provision of the Syndicalism Act under which Harris is charged. Abstention, or nonintervention, must be the rule where, as here, (1) statutory overbreadth results from vagueness, and (2) there is no showing of bad faith enforcement of the challenged statute. By clarifying an allegedly vague enactment, state courts may narrow the law so as to eliminate overbreadth, thereby allowing federal courts to avoid adjudicating the most delicate constitutional question: the extent of federal limitations on state power. Where state officials do not take advantage of vague language in a statute so as to expand its scope to include constitutionally protected conduct, the statute does not produce the intolerable "chilling effect" which demands federal intervention. Bad faith enforcement of the challenged statute is equally relevant to determining the propriety of federal declaratory and injunctive relief. *Dombrowski* did not hold otherwise. *Wells v. Reynolds*, 382 U.S. 39 (1965); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Brooks v. Briley*, 274 F.Supp. 538 (M.D. Tenn. 1967), *aff'd mem.*, 391 U.S. 361 (1968).

Finally, because the Criminal Syndicalism Act is susceptible of a limiting construction readily to be anticipated as a result of the prosecution pending

against Harris, *Dombrowski* prohibited the district court from declaring it invalid.

ARGUMENT

DOMBROWSKI V. PFISTER DOES NOT AUTHORIZE FEDERAL INTERVENTION IN THIS CASE.

A. Absence of an Actual Case or Controversy.

Appellees Harris, Dan, Hirsch, and Broslawsky complained under the Civil Rights Act, 42 U.S.C. § 1983, attacking the California Criminal Syndicalism Act as unconstitutionally vague and overbroad and seeking an injunction against its enforcement. Harris was under indictment for violating a single provision of the Act, Penal Code section 11401(3). Dan, Hirsch, and Broslawsky were not accused of violating the Act, nor had the State engaged in any overt acts directed toward their conduct. Acknowledging that "our decision in no way stems from any apprehension of our own that plaintiffs Dan, Hirsch or Broslawsky stand in any danger of prosecution . . . because of the activities that they ascribed to themselves in the complaint . . .," the three-judge federal court, acting upon the authority of *Dombrowski v. Pfister*, 380 U.S. 479 (1965), nevertheless declared unconstitutional on their face all sections of the Syndicalism Act. Brief for Appellant, 6-8.

The decision below, therefore, stands for the proposition that the mere existence of an arguably vague and overbroad state statute regulating expression or

association authorizes a federal court to declare it invalid. Anyone may seek federal equitable relief, as everyone has standing. *Contra, Dawkins v. Green*, 285 F.Supp. 772, 775 (N.D. Fla. 1968). The District Court's opinion has been understood to mean that "an injunction should issue whenever a statute might possibly infringe on first amendment freedoms despite the chance that it could possibly be interpreted in one state proceeding with 'requisite narrow specificity.'" *Note*, 69 Col.L.Rev. 808, 812 n.32 (1969).

Dombrowski v. Pfister, however, does not authorize federal courts to strike down arguably vague state statutes simply because they exist. Federal intervention is appropriate only if the State has engaged in overt acts of enforcement resulting in irreparable injury, or "chilling effect." In *Dombrowski* all plaintiffs had been indicted and had been otherwise aggrieved by the systematic and abusive enforcement of the challenged state law.

The case or controversy requirement of Article III, section 2 of the United States Constitution marks a boundary beyond which the holding of *Dombrowski* may not be extended. We have previously urged that appellees Dan, Hirsch, and Broslawsky present no justiciable controversy. Therefore, the District Court exceeded its jurisdiction in reviewing separate and severable sections of the Syndicalism Act not involved in the prosecution against Harris. Brief for Appellant, 26-30. *Delta Book Distributors, Inc. v. Cronrich*, 304 F.Supp. 662 (E.D. La. 1969). *Golden v. Zwickler*, 394 U.S. 103 (1969), confirms our view.

B. Abstention is Proper Absent Bad Faith Enforcement of a Statute Challenged as Unconstitutionally Vague.

Appellee Harris presents an actual controversy. He alleged that the Syndicalism Act was on its face unconstitutionally vague and overbroad. The District Court interpreted *Dombrowski* as forbidding abstention. *Harris v. Younger*, 281 F.Supp. 507, 510-11 (C.D. Cal. 1968). We urge that Harris does not present a proper case for federal intervention in a state criminal prosecution.

Abstention, or nonintervention, must be the rule where (1) statutory overbreadth results from vagueness, and (2) there is no showing of bad faith enforcement of the challenged statute.

In such a case abstention permits state courts to invalidate challenged statutes, thereby eliminating a direct federal affront to state sovereignty. See, e.g., *Vogel v. County of Los Angeles*, 68 Cal.2d 18 (1967). Alternatively, state courts may clarify an allegedly vague enactment, thereby narrowing the law so as to eliminate overbreadth. See, e.g., *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 171 P.2d 885 (1946); *People v. Epton*, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), cert. denied, 390 U.S. 29 (1968). In the latter event, federal courts avoid a most delicate constitutional question: the extent of federal limitations on state power. Cf. *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936).

Abstention confers other benefits which may be enjoyed without chilling free expression: it avoids long delays in state criminal prosecutions; it reduces

the burden on federal district courts and on this Court; it encourages state courts to assume full responsibility for protecting federally guaranteed rights; it recognizes state courts as the ultimate arbiters of state law.

Dombrowski decided that a "chilling effect" upon First Amendment freedoms was an unacceptable price for the benefits of abstention. Mr. Justice Harlan has characterized the "chilling effect" doctrine as "amorphous," "slippery," and "ubiquitous." *Zwickler v. Koota*, 389 U.S. 241, 255, 256 n.2 (concurring opinion) (1967). Certainly, the concept is an amiable fiction deserving of scrutiny, *Golden v. Zwickler*, 394 U.S. 103 (1969), decided that the mere existence of an arguably unconstitutional statute regulating conduct in the First Amendment area did not produce an intolerable *in terrorem* or "chilling" effect. Nor does the good faith enforcement of such a law unacceptably inhibit free expression. Indeed, appellees here emphasize that publications appended to our opening brief are dated *after* Harris' indictment. Appellees' Supplemental Brief on Reargument, 17 n.19. The inadequate allegations of Dan, Hirsch, and Broslawsky reflect Harris' difficulties in discovering other plaintiffs actually inhibited by the Syndicalism Act, or by Harris' prosecution.

An unacceptable restraint on free expression may result where state officials take advantage of vague language in a statute so as to expand its scope to include constitutionally protected conduct. This occurred in *Dombrowski*; it did not happen here. Such

enforcement has the same effect as the enforcement of an overbroad statute. Given systematic and abusive enforcement of a vague statute, abstention may be improper. Absent a showing of bad faith enforcement, the balance falls in favor of nonintervention, in favor of permitting state courts to uphold state laws by construing them in a manner consistent with the requirements of the Constitution.

We view the absence of bad faith enforcement as equally relevant on the separate questions of declaratory and injunctive relief. We do not regard a judgment declaring a state statute unconstitutional to be a substantially lesser interference with a state's good faith administration of criminal justice than an injunction against future enforcement. Nor do we regard a declaratory judgment to be a permissible circumvention of the federal anti-injunction statute, 28 U.S.C. § 2283. *Cunningham v. A. J. Aberman, Inc.*, 252 F.Supp. 602 (W.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 747 (3d Cir. 1967). The same criteria should apply in determining the propriety of declaratory judgments and injunctions.

"Statutory vagueness should be eliminated as an independent ground for intervention. The bad faith standard should be broadened to require consideration of the general pattern of police conduct toward the complaining group." *Comment*, 75 Yale L.J. 1007, 1037 (1966).

We do not ask that *Dombrowski* be abandoned, only that its limitations, recognized elsewhere, be acknowledged here. The abstention, or nonintervention, prin-

eiple we urge is consistent with this Court's decisions following *Dombrowski*. Federal intervention was demanded there because of bad faith enforcement of a statute both vague and overbroad. Arrests, seizures of records, and threats of continued prosecutions occurred despite efforts by the plaintiffs to vindicate their rights in successful state court actions.

In *Cameron v. Johnson*, 381 U.S. 741, 742 (1965), Justices Black, Harlan, and Stewart, dissenting, expressed their opinion that federal intervention was justified only when a vague and overbroad statute was enforced in bad faith. *Id.* at 748.

Plaintiffs in *Wells v. Hand*, 238 F.Supp. 779 (M.D. Ga. 1965), attacked the constitutionality of a Georgia statute forbidding the circulation of insurrectionary papers. Bad faith enforcement was alleged but not shown. *Id.* at 784. The District Court, being of the opinion that the statute was capable of a narrowing construction, refused to declare it unconstitutional on its face or to enjoin its enforcement.¹ This Court, per curiam, affirmed the decision of the District Court. *Wells v. Reynolds*, 382 U.S. 39 (1965). Our case differs from *Wells* only in that here bad faith enforcement is not alleged much less shown.

The impact of *Dombrowski* was next considered in *Zwickler v. Koota*, 389 U.S. 241 (1967). Zwickler attacked a New York statute exclusively on grounds of overbreadth, asserting that it punished conduct protected by the First Amendment. This Court held that

¹The same statute later was declared unconstitutional on its face. *Carmichael v. Allen*, 267 F.Supp. 985 (N.D. Ga. 1966).

abstention from a declaratory judgment was inappropriate because the state law was not susceptible of a narrowing construction by state courts. *Id.* at 249-52, 256-57. This followed the holding of *Baggett v. Bullitt*, 377 U.S. 360 (1964), wherein the Court declined to abstain from passing on the constitutionality of a 1931 Washington loyalty oath because:

“We doubt, in the first place, that a construction of the oath provisions, in light of the vagueness challenge, would avoid or fundamentally alter the constitutional issue raised in this litigation.” *Id.* at 375-76.

Unlike *Koota* and *Baggett*, the question of overbreadth in our case may be resolved by a narrowing interpretation by California courts. Indeed, it is our position that such a limiting construction has been placed upon the Syndicalism Act. Brief for Appellant, 15-26.

Later, in *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court said “We viewed *Dombrowski* to be a case presenting a situation of the ‘impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants’ activities. . . .’” 390 U.S. at 619. Some saw in this a step away from *Dombrowski*:

“It must be assumed . . . that in *Cameron v. Johnson II* the Court retreated from its position in *Dombrowski* that the mere existence of a law unconstitutional on its face provides a basis for attacking it.” Note, 69 Col.L.Rev. 808, 816 (1969).

In fact, *Dombrowski* did not hold that the mere existence of a statute warranted federal review.

On the authority of *Cameron II*, the Court then affirmed the decision of the District Court in *Brooks v. Briley*, 274 F.Supp. 538 (M.D. Tenn. 1967), *aff'd mem.*, 391 U.S. 361 (1968). *Brooks* held abstention appropriate where a state statute was attacked as vague and overbroad, absent a showing of bad faith enforcement.

"While the *Dombrowski* opinion contains language which may be susceptible of the interpretation that abstention is never appropriate where statutes regulating expression are properly challenged for facial vagueness or overbreadth, we do not believe that the Supreme Court has committed itself to such a doctrinaire position where, as here, there is no predicate for finding a bad faith invocation or use of criminal laws, or chilling effects or irreparable injury if state criminal proceedings are allowed to continue. This would appear to be indicated by the Supreme Court's affirmance, after its *Dombrowski* decision, of *Wells v. Hand*. . ." *Brooks v. Briley*, 274 F.Supp. at 550.

The principle to be distilled from the Court's decisions is this: abstention is proper where in a pending case a state court may, by clarifying a vague statute, eliminate overbreadth; provided that state officials have not exploited the uncertainty of the law by applying it without hope of conviction so as to discourage the exercise of protected freedoms. *Dombrowski* did not wholly discard the teaching of *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-177 (1959), that federal courts should not adjudicate the constitutionality of state statutes fairly open to interpretation until

state courts have been afforded a proper opportunity to pass upon them.² *Accord, Turner v. Labelle*, 251 F.Supp. 443 (D.C. Conn. 1966); *Duncombe v. State of New York*, 267 F.Supp. 103 (S.D. N.Y. 1967); *Zwicker v. Boll*, 270 F.Supp. 131 (W.D. Wis. 1967).

C. Dombrowski Does Not Authorize Federal Invalidation of California's Syndicalism Act Because It Is Susceptible of a Limiting Construction Readily to be Anticipated as a Result of the Pending Prosecution.

We have pointed out that in reviewing the Syndicalism Act, the District Court completely ignored several decisions by California appellate courts clarifying and limiting the terms of the statute. Brief for Appellant, 15-26. Words used by a state supreme court in construing a statute are as much a part of the statute as if the Legislature had put them there.

²The entire Syndicalism Act was no more placed before the state courts by Harris than before the federal district court by all of the appellees. The state trial court was never afforded an opportunity to narrow the meaning of the Penal Code section 11401(3) by limiting instructions. Cf. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). The state appellate courts did not pass upon the merits of the constitutional challenge in denying Harris a writ of prohibition, for the writ is discretionary.

Harris complains that the state courts allowed his prosecution to proceed without requiring a showing that his conduct created a clear and present danger that a change in industrial ownership or political reform would result, a showing that his conduct constituted incitement to imminent lawless action, and a showing of specific intent to accomplish immediate political or economic change. Appellees' Supplemental Brief on Reargument, 7-15.

First, since the Act proscribes advocacy of violent acts for the purpose of achieving political or economic change, the state is obliged to show that a defendant's conduct gave rise to a clear and present danger of violent acts, not to a likelihood of social change. Second, the clear and present danger test is judicially imposed after the facts surrounding the charged offense have been developed at trial. Similarly, intent to incite others to imminent lawless action and conduct having the effect of incitement are factual matters to be shown at trial.

Winters v. New York, 333 U.S. 507, 514 (1948); *Albertson v. Millard*, 345 U.S. 242, 244 (1953). Nevertheless, the District Court overlooked *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 545, 171 P.2d 885, 891 (1946), wherein Justice Traynor wrote that:

“The Criminal Syndicalism Act can . . . be applied only when there is imminent danger that the advocacy of the doctrine it seeks to prohibit will give rise to the evils that the state may prevent.”

Danskin thus narrowed the definition of advocacy proscribed under the Act to conform with the requirements of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). We adhere to our position that, as construed by our state courts, the Syndicalism Act is constitutional. As we did not rely upon *Whitney v. California*, 274 U.S. 357 (1927), holding that the statute is constitutional as enacted, the overruling of *Whitney* in *Brandenburg* does not affect our submission.

Appellees argue that the recited language in *Danskin* is dictum. Appellees' Supplemental Brief on Reargument, 14 n.15. Our disagreement on this point, however, is insignificant for the quoted statement by Justice Traynor surely cannot be authoritative or nonauthoritative according to a lawyer's esoteric distinction between dictum and holding.³ *Danskin* and other state appellate decisions allay all reasonable

³Appellees' suggestion that the declaration in *Danskin* is nullified by *American Civil Liberties Union v. Board of Education*, 59 Cal.2d 203, 379 P.2d 4 (1963), is utterly devoid of merit. Appellees' Supplemental Brief on Reargument, 14 n.15.

fears that the Act can be applied to constitutionally protected conduct.

Assuming, however, that had the District Court considered relevant state court decisions, it could properly have concluded that they failed authoritatively to cure vagueness and overbreadth, it should have found reason in those decisions to abstain from declaring the statute unconstitutional.

Dombrowski expressly states that abstention is proper where "a readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution. . ." *Id.* at 491. *Danskin*, *People v. Malley*, 49 Cal.App. 597, 194 Pac. 48 (1920), *People v. Flanagan*, 65 Cal.App. 268, 276, 223 Pac. 1014, 1017 (1924), and other state decisions supply a rehabilitating construction. California courts, which "regularly have shown full alertness to accept and be governed by the constitutional interpretations that are enunciated by the Supreme Court," should have been permitted to supply that construction in the Harris prosecution. *Harris v. Younger*, 281 F.Supp. at 510. Compare *People v. Epton*, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967), cert. denied, 390 U.S. 29 (1968). Instead, contrary to the inhibition of 28 U.S.C. § 2283, the prosecution pending against Harris was enjoined.

CONCLUSION

The District Court administered an overdose of the "strong medicine"⁴ prescribed by *Dombrowski v. Pfister*. The decision of the District Court declaring the Syndicalism Act unconstitutional should be reversed. The injunction against appellant Younger should be dissolved.

Dated, February 20, 1970.

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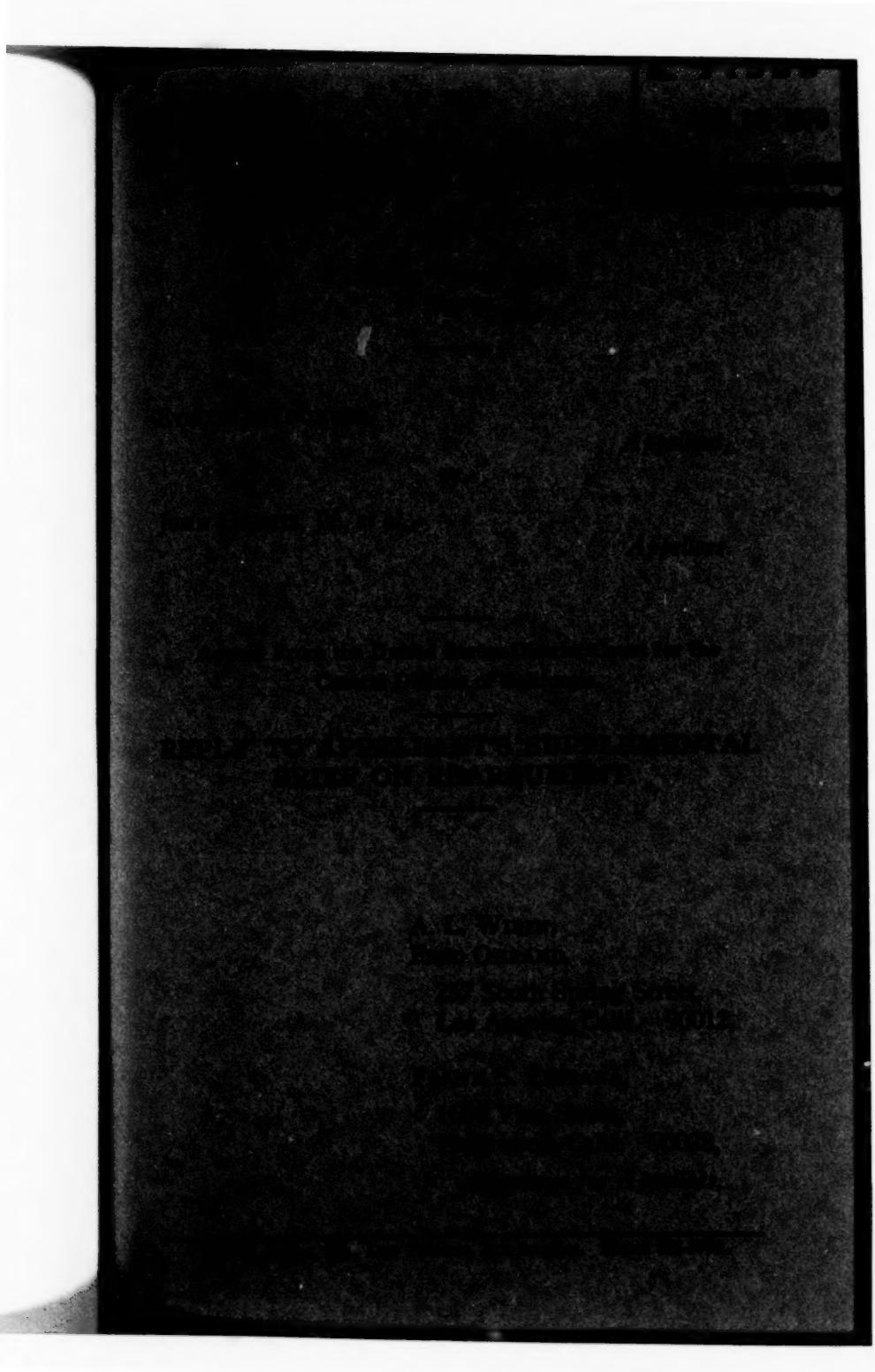
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⁴*Cameron v. Johnson*, 390 U.S. 611, 622, 623 (dissenting opinion of Mr. Justice Fortas) (1968).



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IN THE
Supreme Court of the United States

October Term, 1969
No. 4

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

**Appeal From the United States District Court for the
Central District of California.**

**REPLY TO APPELLANT'S SUPPLEMENTAL
BRIEF ON REARGUMENT.¹**

Preliminary Statement.

1. Recent ruling of this Court:

In *Reetz v. Bozanich*, this Term, No. 185 (Feb. 25, 1970), ..., U.S. ..., 26 L. Ed. 2d 68, 38 U.S. Law Week 4170, the state court was given no chance to adjudicate the issue under the provisions of the state constitution; that opportunity was accorded by the appellee Harris, in his filing appropriate proceed-

¹This brief, in addition to replying to Appellant's Supplemental Brief on Reargument, will discuss briefly the latest ruling of this Court (made subsequent to our last brief); and the relevancy of the six cases, which are presently set for argument, following the instant cause.

We do this in the "Preliminary Statement" above.

ings, before repairing for relief in the United States District Court, both in the California Court of Appeals and in the Supreme Court of California, in which he challenged the California Criminal Syndicalism Act both on its face and as applied, not only as offending the United States Constitution, but because violating the Constitution of the State of California. (See copy of Petition for Writ of Prohibition [page 13 of Memorandum of Points and Authorities in Support of Petition] lodged with the Clerk of this Court. Under California procedure, all documents filed in the State Court of Appeals are transferred to the California Supreme Court upon the filing in that Court of a Petition for Hearing. [Rule 28(b), California Rules of Court.])

2. The cases presently set for argument, in this Court, following this case:

a. In none of them was relief sought and pursued in the state courts, including the appellate courts of the state, prior to seeking redress in a United States District Court.

Specifically:

i. New York has no provision, as does California, that a copy of the transcript of the Grand Jury proceedings be furnished to a defendant. (Calif. Penal Code §938.1) (See Reply Brief After Argument by appellant Fernandez in *Fernandez v. Mackell*, No. 20, p. 22. The foregoing statement in *Fernandez* is applicable also to *Samuels v. Mackell*, No. 11.)

The California procedure provides for a review in the California Courts, including California's Court of

Appeal and Supreme Court, by way of a Petition for a Writ of Prohibition, to challenge not only the sufficiency of the evidence, but the constitutionality of the statute under which the indictment was filed. (See *Moore v. Municipal Court*, 170 Cal. App. 2d 548, 339 P. 2d 196; *Hunter v. Justice's Court*, 36 Cal. 2d 315, 323, 223 P. 2d 465.) As to the latter, in California, prohibition is the counterpart of habeas corpus. (170 Cal. App. 2d at 553).

ii. Hence, the argument made in this Court in *Dyson v. Stein*, No. 565, by appellant (Brief for Appellant, p. 28), that appellant there could (and should) have sought habeas corpus in the state courts, has no application to the case here. As does not the claim made in *Boyle v. Landry*, No. 6 (see opinion of the District Court, *Landry v. Daley*, 280 F. Supp. 938, 946) that constitutional attack on the statutes should have been made in the criminal cases pending in the state courts, pursuant to the procedures available for that purpose under Illinois law.

iii. For the foregoing reasons, moreover, it can not be said that: "In this case, a Federal District Court stepped into the middle of a pending state criminal prosecution . . ." Mr. Justice Black in *Byrne v. Karalexis*, No. 1149, 396 U.S. 976, 982.

On the contrary, here, not until after taking and coming to the end of a road for judicial relief in the California State Courts—a State road specifically built by state statute, affording judicial redress after indictment and *prior* to trial—did appellee Harris turn to a United States District Court.

I.

This Is Not a Case for Abdication by a United States District Court (Reply to Appellant's Point C; pp. 11-13).

What actually happened in this case is the same as though a formal order of abstention had been made by the District Court.² It is to be remembered that the judge-made (*Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496) abstention doctrine does not call for the district court to dismiss the action (although some courts have [see f.n. 4, *Zwickler v. Koota*, 389 U.S. 241 at 244]), but rather to retain jurisdiction to enable the plaintiff to go to the state courts in order that he may come back to the federal court if necessary (*ibid.*; and see cases in f.n. 10 of *Zwickler*, 389 U.S. at 248). In effect, that is what happened here. The case is just as though the plaintiff Harris, immediately upon being indicted, had gone to the federal court seeking an injunction against the prosecution on the ground of the unconstitutionality of the statute. Had the district court at that time decided to abstain, its proper order would have been to "retain the bill pending a determination of proceedings to be brought with reasonable promptness in the state court." (*Railroad Commission v. Pullman Co., supra*, 312 U.S. at 501-502.) Plaintiff having done that without success, as this record shows, he would be entitled to the federal court's disposition of his claim. (Cf. *England v. Louisiana State Board of Medical Examiners*, 385

²In *Reetz v. Bozanich*, *supra*, ... U.S. ..., 26 L. Ed. 2d 68, 72, this Court said:

"We think the federal court should have stayed its hand while the parties repaired to the state courts . . ." This, in effect, is precisely what the Trial Court and appellee Harris did here.

U.S. 411.) Appellant can not complain because appellee applied "self-abstention" and went directly to the state court without awaiting an order so to do by the federal court. Surely, the abstention doctrine is not a merry-go-round.

Appellant states in his Supplemental Brief (p. 11, f.n. 2) that "[t]he state trial court was never afforded an opportunity to narrow the meaning of the Penal Code section 11401(3) by limiting instructions," citing *Brandenburg v. Ohio*, 395 U.S. 444, 448. We assume appellant means instructions to the jury. If he does, the statement is true, but so what? Limiting jury instructions is not the only way a court may narrow a statute. (A trial itself may be without a jury.) The point is that the state trial court was given the opportunity to so do on the "Section 995" motion, and by demurrer; but it failed to, saying merely "The Court finds that it is of the opinion the statute involved is not unconstitutional and therefore the Demurrer is overruled. Defendant's motion under Section 995 Penal Code is denied." (Minutes of Dec. 1, 1966; Ex. C to Petition for Writ of Prohibition in California District Court of Appeal; Appendix to Appellee's Supplemental Brief, lodged with the Clerk of this Court.)

And the California Court of Appeal and Supreme Court affirmed and were equally silent.

Appellant asserts (f.n. 2, p. 11, Supplemental Brief) that "[t]he state appellate courts did not pass upon the merits of the constitutional challenge in denying Harris a writ of prohibition, for the writ is discretionary," citing no case or other authority. In the first place, even if the writ is discretionary (which, as we point out below, it is not), that does not assist appell-

lant in its "abstention" argument. Even appellant uses the term "opportunity" as being what the state court must be afforded under the asserted abstention doctrine (*ibid.*). And the state courts here had just that.⁸ Whatever may be said of the advantages of the abstention principle (see Appellant's Supplemental Brief, pp. 5-6), it surely cannot be stretched to require that the state courts be given two bites at the apple before a federal court will be permitted to exercise its jurisdiction. This should be especially evident where a speech-inhibiting statute is involved.

Moreover, California's "995" and writ of prohibition procedure are *not* discretionary. The process is a carefully delineated one, designed specifically to prevent California defendants from being put to the "unreasonable expense, inconvenience, and delay" (*Greenberg v. Superior Court*, 19 Cal. 2d 319, 323, 121 P. 2d 713) and the "grave injustice" of being "required to undergo the ordeal, ignominy and expense of a trial" (*Jensen v. Superior Court*, 96 Cal. App. 2d 112, 118, 214 P. 2d 828) where evidence of an essential element of the crime has not been adduced before the grand jury (*ibid.*): and where a state statute is unconstitutional on its face (*Moore v. Municipal Court*, *supra*, 170 Cal. App. 2d 548, 552-3, 339 P. 2d 196), or as applied (*Patterson v. Municipal Court*, 232 Cal. App. 2d 289, 294, 42 Cal. Rptr. 769). In such a case, "the court . . . is without jurisdiction to proceed" (*Parks v. Superior Court*, 38 Cal. 2d 609, 615, 241 P. 2d 521); the "indictment is void and confers no jurisdiction upon a court to try a person for the offense charged." (*Green-*

⁸The District Court below expressly noted this. [R. 21.]

berg, supra, 19 Cal. 2d at 322.) For it "encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty" (*ibid.*). In California "a court is without jurisdiction to subject a citizen to criminal prosecution for violation of an unconstitutional statute." (*In re Berry*, 68 Cal. 2d 137, 145, 65 Cal. Rptr. 273, 436 P. 2d 27; see, also, *Moore v. Municipal Court, supra*, 170 Cal. App. 2d 548, 552, 339 P. 2d 196: "The most recent cases recognize that the requirement that a defendant in a criminal case stand trial by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public." And [170 Cal. App. 2d at 553], "submission to trial [under an unconstitutional statute] and appeal from an adverse judgment would not be an adequate remedy.")

California Penal Code Section 995 provides that "[t]he indictment . . . must be set aside (where) . . . the defendant has been indicted without reasonable or probable cause." (Emphasis added.) And Section 996 provides that if the 995 motion is not made "the defendant is precluded from afterwards taking the objections mentioned in Section 995." This means that if evidence of an essential element of the offense was not adduced before the grand jury (or before a committing magistrate) and the defendant fails to make a 995 motion, the prosecution may cure the defect at trial and the defendant cannot complain. (*People v. Bryant*, 256 Cal. App. 2d 470, 472, 64 Cal. Rptr. 86.) But it likewise means that if the element is lacking before the grand jury and the defendant does make a 995 motion,

the prosecution will not be heard to say it will cure the matter with proof at trial. (*Buck v. Superior Court*, 245 Cal. App. 2d 431, 433, 54 Cal. Rptr. 282: “[I]f the People have left gaps in their proof, which could be filled by additional evidence, their remedy is to resubmit the matter to a magistrate or to a grand jury; they cannot supplement their proofs by additional evidence on the motion under 995 or in this court.”)

Anticipating that despite the mandatory requirement of Section 995, there would be occasions where trial courts would not grant 995 motions, the California legislature provided for review of such denials by prohibition. Section 999a provides in pertinent part:

“A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause . . . must be filed in the appellate court within 15 days after a motion made under Section 995 . . . has been denied by the trial court. . . . The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment . . .”

Accordingly, under this California statute, the issuance of the writ is not discretionary; and the cases so hold. Thus, in *Buck, supra*, “if the evidence before . . . the grand jury does not meet the test of sufficiency the motion *must* be granted and a denial *will* be overturned here.” (245 Cal. App. 2d at 433) (Emphasis added.) In *Badillo v. Superior Court*, 46 Cal. 2d 269, 271, 294

P. 2d 23: “[I]n such a case the trial court should grant a motion to set aside the information (Pen. Code §995), and if it does not do so, a peremptory writ of prohibition *will* issue to prohibit further proceedings. (Pen. Code §999a.)” (Emphasis added.) *Rollins v. Superior Court*, 223 Cal. App. 2d 219, 223, 35 Cal. Rptr. 734: “[U]nless (the evidence, there, before the committing magistrate) affords a rational ground for assuming the possibility that the person charged is guilty, he is *entitled* to a writ of prohibition to prevent further proceedings against him.” (Emphasis added.) And *Murphy v. Superior Court*, 188 Cal. App. 2d 185, 188, 10 Cal. Rptr. 176: “Inasmuch as under the facts presented, petitioner fell squarely within the purview of Penal Code, section 995 . . . respondent court should have granted her motion to set aside the information. Therefore, having proceeded timely under Penal Code, section 999a, she is *entitled* to have a peremptory writ of prohibition issued, restraining respondent court from further proceeding upon the matter.” (Emphasis added.)

Appellant states (p. 11, Supp. Br. f.n. 2), that the clear and present anger test comes into play “after the facts surrounding the charged offense have been developed at trial,” and that intent and incitement “are factual matters to be shown at trial.” No authority is cited. What appellant forgets is that under the California procedure we have above outlined, *all* the elements of the offense have to be spelled out in the testimony submitted to the Grand Jury before a defendant will be required to stand trial. The deficiency cannot be cured at trial. (*Buck v. Superior Court, supra*, 245 Cal. App. 2d 431, 433, 54 Cal. Rptr. 282.)

In the case at bar, the record is that all the California courts allowed the prosecution to go forward, both because the statute was held by the trial court to be constitutional; and because it was deemed that all the constitutionally necessary elements of the speech offense had been presented to the grand jury. As we have seen, none of this is so.

Under the circumstances, it would have been a weird administration of federal justice for the district court to have abstained and to have sent the plaintiff before it, Harris, back to the state courts to seek relief. The case at bar is well within the recommendation of the American Law Institute's "Study of the Division of Jurisdiction Between State and Federal Courts" (1969), §1372(7), pp. 52, 308. In the case of a plainly unconstitutional state statute (as, we say, California's Criminal Syndicalism Act is), the ALI recommendation is that there need be no resort to the state courts at all.) How much clearer, then, should be the right to the injunction when, as here, the plaintiff has first gone to all the state courts.

In *Greenwood v. Peacock*, 384 U.S. 808, 829, the Court (per Mr. Justice Stewart) stated that if a state prosecution "would itself clearly deny (their) rights protected by the first Amendment, they may under some circumstances obtain an injunction in the federal court", citing *Dombrowski v. Pfister*, 380 U.S. 479.

This case is that circumstance.

And, the refusal by the District Court below to abstain, in the exercise of its discretion, certainly does "not operate to work a wholesale dislocation of the historic relationship between the state and the federal

courts in the administration of the criminal law," *Greenwood v. Peacock, supra*, at p. 831.

We suggest, too, that the rationale of *W.E.B. Du Bois Clubs of America v. Clark*, 389 U.S. 309, 311, may be applicable here—although at issue there was not, as here, abstention, with respect to a state court proceeding. There, Congress provided a way for appropriate parties "to raise their constitutional claims"; here, California also did so. There, it was not clear (at p. 312) that the statute applied to the objecting parties; here, there is no dispute by the appellant that it does to appellee Harris. There (*ibid.*), there was no effort to exhaust administrative remedies; here, there was every effort.

II.

The District Court Properly Declared Unconstitutional the California Criminal Syndicalism Act on Its Face. (Reply to Appellant's Point A; pp. 3-4).

Appellant apparently considers that the District Court struck down the remaining subdivisions of California Penal Code 11401, subdivisions 1, 2, 4 and 5, only because of the presence as plaintiffs of Dan and Hirsch, the members of the Progressive Labor Party, and of Broslawsky, the college history instructor. Appellant is mistaken. The court below issued no order concerning those plaintiffs. [R. 38]. Its only order was as to plaintiff Harris. [R. 17.] It is that order which is being presently reviewed in this Court.

Hence, plaintiffs Dan, Hirsch and Broslawsky are improperly appellees in this Court and the appeal as to them should be dismissed. We should have called

this expressly to the attention of the Court before now. Quite frankly, we fully realized that fact for the first time when we were preparing this Reply to appellant's Point A of his Supplemental Brief on Re-argument.*

But the absence of plaintiffs Dan, Hirsch and Broslawsky in this Court does not detract from the proper action of the Court below in holding unconstitutional, as to Harris, the entire statute on its face.

In the first place, historically, it has been Criminal Syndicalism *Acts* which have been the subject of attention, and not merely particular subdivisions which prohibit, variously, advocating, justifying, printing, organizing or committing syndicalism (see, e.g., Dowell, "A History of Criminal Syndicalism Legislation in the United States," LVII Johns Hopkins University Studies in History and Political Science, 1939; Kirchwey, "A Survey of the Workings of the Criminal Syndicalism Law in California," 1926; Whitten, "Criminal Syndicalism and the Law in California, 1919-1927", Transactions of the American Philosophical Society, New Series, Vol. 59, Part 2, 1969.⁵ Even *Whitney v.*

*Subliminally, we apparently recognized it earlier for we filed the motion to affirm only on behalf of appellee Harris. However, in our Brief for Appellees, pp. 28-29, argument was made on behalf of the other three plaintiffs, as was also done in appellees' Supplemental Brief on Reargument, pp. 22-23. Why we did not realize then that appellant had no right to appeal as to Dan, Hirsch and Broslawsky, we cannot explain. But we are comforted by Mr. Justice Frankfurter's words, dissenting in *Henlee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600: "Wisdom too often never comes and so one ought not to reject it merely because it comes late." See, also, Mr. Justice Jackson, concurring in *McGrath v. Kristensen*, 340 U.S. 162, 177-178.

⁵These latter two documents, for the convenience of the Court, have been lodged with the Librarian of this Court.

California referred to "The Syndicalism Act", 274 U.S. at 372 (though only subdivision 4 was involved), as did this Court in *Brandenburg v. Ohio*, 395 U.S. 444, 448: "Ohio's Criminal Syndicalism Act cannot be sustained." And see the famous, or infamous, injunction in *In re Wood*, 194 Cal. 49, 52-53, which incorporated in one decree all the substantive subdivisions of the Act. In other words, "criminal syndicalism", the "doctrine or precept advocating, teaching or aiding and abetting" (Calif. Penal Code §11400), is what the crime is. The various subdivisions (in California, now set out in Penal Code 11401) are mere variations on the theme.

But, be that as it may, the subdivisions of Section 11401 make up just the kind of a statute, free speech-wise, which made it appropriate for the trial court to have considered them all, even though Harris was charged under just one (§11401[3]). This, under the theory of *Thornhill v. Alabama*, 310 U.S. 88, 97-98, that the existence of a statute, "which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . Where regulations of the liberty of free discussions are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

The *Thornhill* doctrine was reiterated in *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 432-433: "[I]n apprais-

ing a statute's inhibiting effect upon such (First Amendment) rights, this Court has not hesitated to take into account possible applications in other contexts besides that at bar." This, because of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Moreover, the very nature of the statute is such that "extensive adjudications, under the impact of a variety of factual situations" (Mr. Justice White, for the Court, in *Baggett v. Bullitt*, 377 U.S. 360, 378) would be required to bring the statute within constitutional bounds. Just as "[a]bstention does not require this" (*ibid.*), neither does the fact that Harris was charged here under only one subdivision of the Act. We believe that this was the rationale of the Court in *Dombrowski v. Pfister, supra*, 380 U.S. 479, 491, citing *Baggett*, where this Court, after observing that "a series of criminal prosecutions" would "deal . . . as they inevitably must with only a narrow portion of the prohibition at any one time," said: "We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal. . . ."

Accordingly, it was proper, indeed, essential, that the entire statutory scheme be adjudicated.

III.

Bad Faith Has Characterized Prosecutions Under California's Criminal Syndicalism Act. (Reply to Appellant's Point B; pp. 5-11).

In his "Survey of the Workings of the Criminal Syndicalism Law of California," *supra*, Prof. Kirchwey concluded (p. 37) that it had been converted, in many instances, "by maladministration into an instrumentality of injustice and oppression"; that the trials "were in many instances characterized by methods calculated to bring serious reproach on the administration of the law in California"; that the prosecutions (at p. 12) reflected the "vindictive spirit of the community"; that in the trials, prosecutors offered (and the California trial courts received) evidence (at p. 16) "so irrelevant and at the same time so prejudicial, that, in an ordinary criminal trial, the prosecuting attorney would have been ashamed to offer it";⁶ and that the prosecuting attorneys, in all but a very few notable instances, conducted the prosecutions with vindictiveness and "unscrupulous disregard of orderly and lawful procedure" (at p. 19).

Professor Whitten, in his study "Criminal Syndicalism and the Law in California: 1919-1927," *supra*, is essentially of the same view as Prof. Kirchwey. He concluded that convictions were secured due to the "class interests and bias of prosecuting officials"—and of others, too (at p. 63).

⁶The "evidence" deemed by the prosecution to be relevant, attached to the Brief by Appellant here is in the same pattern.

So Prof. Dowell, in "A History of Criminal Syndicalism Legislation in the United States," *supra*⁷ arrived at the conclusion that "In California, the prosecutions under the criminal syndicalism law were more intense than in any other state and involved greater injustice." He likened the prosecutions to those under the "Federal-born Alien and Sedition Act of 1798" (at p. 14). This Court has already spoken as to that Act. (*New York Times v. Sullivan*, 376 U.S. 254, 274.)

Conclusion.

The order should be affirmed.

Respectfully submitted,

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⁷Noted by this Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1970

Evelle J. Younger, Appellant, } On Appeal From the
v. } United States District
John Harris, Jr., et al. } Court for the Central
 } District of California.

[February 23, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellee, John Harris, Jr., was indicted in a California state court, charged with violation of the California Penal Code §§ 11400 and 11401, known as the California Criminal Syndicalism Act, set out below.¹ He then filed

¹ *“§ 11400. Definition*

“‘Criminal syndicalism’ as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”

“§ 11401. Offense; punishment

“Any person who:

“1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

“2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

“3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed

a complaint in the Federal District Court, asking that court to enjoin the appellant, Younger, the District Attorney of Los Angeles County, from prosecuting him, and alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments. Appellees Jim Dan and Diane Hirsch intervened as plaintiffs in the suit, claiming that the prosecution of Harris would inhibit them as members of the Progressive Labor Party from peacefully advocating the program of their party, which was to replace capitalism with socialism and to abolish the profit system of production in this country. Appellee Farrell Broslawsky, an instructor in history at Los Angeles Valley College, also intervened claiming that the prosecution of Harris made him uncertain as to whether he could teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork. All claimed that unless the United States court restrained the state prosecution of Harris each would suffer immediate and irreparable injury. A three-judge Federal District Court, convened pursuant to 28 U. S. C. § 2284, held that it had jurisdiction and power to restrain the District Attorney from prosecuting, held that the State's Criminal Syndicalism Act was void for vagueness and

advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

overbreadth in violation of the First and Fourteenth Amendments, and accordingly restrained the District Attorney from "further prosecution of the currently pending action against the plaintiff Harris for alleged violation of the Act." 281 F. Supp. 507, 517 (1968).

The case is before us on appeal by the State's District Attorney Younger, pursuant to 28 U. S. C. § 1253. In his notice of appeal and his jurisdictional statement appellant presented two questions: (1) whether the decision of this Court in *Whitney v. California*, 274 U. S. 357, holding California's law constitutional in 1927 was binding on the District Court and (2) whether the State's law is constitutional on its face. In this Court the brief for the State of California, filed at our request, also argues that only Harris, who was indicted, has standing to challenge the State's law, and that issuance of the injunction was a violation of a long-standing judicial policy and of 28 U. S. C. § 2283, which provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

See, e. g., *Atlantic Coast Line R. Co. v. Engineers*, 398 U. S. 281, 285-286 (1970). Without regard to the questions raised about *Whitney v. California*, *supra*, since overruled by *Brandenburg v. Ohio*, 395 U. S. 444 (1969), or the constitutionality of the state law, we have concluded that the judgment of the District Court, enjoining appellant Younger from prosecuting under these California statutes, must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.² We express no view about the

² Appellees did not explicitly ask for a declaratory judgment in their complaint. They did, however, ask the District Court to grant

circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.

I

Appellee Harris has been indicted, and was actually being prosecuted by California for a violation of its Criminal Syndicalism Act at the time this suit was filed. He thus has an acute, live controversy with the State and its prosecutor. But none of the other parties plaintiff in the District Court, Dan, Hirsch, or Broslawsky, has such a controversy. None has been indicted, arrested, or even threatened by the prosecutor. About these three the three-judge court said:

"Plaintiffs Dan and Hirsch allege that they are members of the Progressive Labor Party, which advocates change in industrial ownership and political change, and that they feel inhibited in advocating the program of their political party through peaceful, non-violent means, because of the presence of the Act 'on the books,' and because of the pending criminal prosecution against Harris. Plaintiff Broslawsky is a history instructor, and he alleges that he is uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works may subject him to prosecution for violation of the Act." 281 F. Supp., at 509.

"such other and further relief as to the Court may seem just and proper," and the District Court in fact granted a declaratory judgment. For the reasons stated in our opinion today in *Samuels v. Mackell, post*, we hold that declaratory relief is also improper when a prosecution involving the challenged statute is pending in state court at the time the federal suit is initiated.

Whatever right Harris, who is being prosecuted under the State Syndicalism law may have, Dan, Hirsch, and Broslawsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases. See *Golden v. Zwickler*, 394 U. S. 103 (1969). Since Harris is actually being prosecuted under the challenged laws, however, we proceed with him as a proper party.

II

Since the beginning of this Country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: ". . . nor shall a writ of injunction be granted to stay proceedings in any court of any state . . ." 1 Stat. 335, c. 22. A comparison of the 1793 Act with 28 U. S. C. § 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language

of the old Act. During all this lapse of years from 1793 to 1970 the statutory exceptions to the 1793 congressional enactment have been only three: (1) ". . . except as expressly authorized by Act of Congress . . ."; (2) ". . . where necessary in aid of its jurisdiction . . ."; and (3) ". . . to protect or effectuate its judgments . . ." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. See *Ex parte Young*, 209 U. S. 123 (1908).³

The precise reasons for this long-standing public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital

³ For an interesting discussion of the history of this congressional policy up to 1941, see *Toucey v. New York Life Insurance Company*, 314 U. S. 118 (1941).

consideration, the notion of "comity," that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. In *Fenner v. Boykin*, 271 U. S. 240 (1926), suit had been brought in the Federal District Court seeking to enjoin state prosecutions under a recently

enacted state law that allegedly interfered with the free flow of interstate commerce. The Court, in a unanimous opinion made clear that such a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances:

"*Ex parte Young*, 209 U. S. 123, and following cases have established the doctrine that when absolutely necessary for the protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely on his defense in the state courts, even though this involves a challenge to the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Id.*, at 243-244.

These principles made clear in the *Fenner* case have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. See, e. g., *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89 (1935); *Beal v. Missouri Pac. R. Co.*, 312 U. S. 45 (1941); *Watson v. Buck*, 313 U. S. 387 (1941); *Williams v. Miller*, 317 U. S. 599 (1942); *Douglas v. City of Jeannette*, 319 U. S. 157 (1943).

In all of these cases the Court stressed the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal

prosecutions, even irreparable injury is insufficient unless it is "both great and immediate." *Fenner, supra*. Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. See, e. g., *Ex parte Young, supra*, at 145-147. Thus, in the *Buck* case, *supra*, 313 U. S., at 400, we stressed:

"Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. 'No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.' *Beal v. Missouri Pacific Railroad Corp.*, 312 U. S., 45, 49."

And similarly, in *Douglas, supra*, we made clear, after reaffirming this rule, that:

"It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith . . ." 319 U. S., at 164.

This is where the law stood when the Court decided *Dombrowski v. Pfister*, 380 U. S. 479 (1965), and held that an injunction against the enforcement of certain state criminal statutes could properly issue under the

circumstances presented in that case.⁴ In *Dombrowski*, unlike many of the earlier cases denying injunctions, the complaint made substantial allegations that:

“the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.” 380 U. S., at 482.

The appellants in *Dombrowski* had offered to prove that their offices had been raided and all their files and records

⁴ Neither the cases dealing with standing to raise claims of vagueness or overbreadth, *e. g.*, *Thornhill v. Alabama*, 310 U. S. 88 (1940), nor the loyalty oath cases, *e. g.*, *Baggett v. Bullitt*, 377 U. S. 360 (1964), changed the basic principles governing the propriety of injunctions against state criminal prosecutions. In the standing cases we allowed attacks on overly broad or vague statutes in the absence of any showing that the defendant's conduct could not be regulated by some properly drawn statute. But in each of these cases the statute was not merely vague or overly broad “on its face”; the statute held to be vague or overly broad as construed and applied to a particular defendant in a particular case. If the statute had been too vague as written but sufficiently narrow as applied, prosecutions and convictions under it would ordinarily have been permissible. See *Dombrowski, supra*, 380 U. S., at n. 7.

In *Baggett* and similar cases we enjoined state officials from discharging employees who failed to take certain loyalty oaths. We held that the States were without power to exact the promises involved, with their vague and uncertain content concerning advocacy and political association, as a condition of employment. Apart from the fact that any plaintiff discharged for exercising his constitutional right to refuse to take the oath would have had no adequate remedy at law, the relief sought was of course the kind that raises no special problem—an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution.

seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes. These circumstances, as viewed by the Court sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention. See, *e. g.*, *Beal, supra*, 312 U. S., at 50. Indeed, after quoting the Court's statement in *Douglas* concerning the very restricted circumstances under which an injunction could be justified, the Court in *Dombrowski* went on to say:

"But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 380 U. S., at 485-486.

And the Court made clear that even under these circumstances the District Court issuing the injunction would have continuing power to lift it at any time and remit the plaintiffs to the state courts if circumstances warranted. 380 U. S., at 491, 492. Similarly, in *Cameron*

v. *Johnson*, 390 U. S. 611 (1968), a divided Court denied an injunction after finding that the record did not establish the necessary bad faith and harassment; the dissenting Justices themselves stressed the very limited role to be allowed for federal injunctions against state criminal prosecutions and differed with the Court only on the question whether the particular facts of that case were sufficient to show that the prosecution was brought in bad faith.

It is against the background of these principles that we must judge the propriety of an injunction under the circumstances of the present case. Here a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that Harris faces is solely "that incidental to every criminal proceeding brought lawfully and in good faith," *Douglas, supra*, and therefore under the settled doctrine we have already described he is not entitled to equitable relief "even if such statutes are unconstitutional," *Buck, supra*.

The District Court, however, thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found "on its face" to be vague or overly broad, in violation of the First Amendment. We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument. But as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-estab-

lished standards. In addition, we do not regard the reasons adduced to support this position as sufficient to justify such a substantial departure from the established doctrines regarding the availability of injunctive relief. It is undoubtedly true, as the Court stated in *Dombrowski*, that "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." 380 U. S., at 486. But this sort of "chilling effect," as the Court called it, should not by itself justify federal intervention. In the first place, the chilling effect cannot be satisfactorily eliminated by federal injunctive relief. In *Dombrowski* itself the Court stated that the injunction to be issued there could be lifted if the State obtained an "acceptable limiting construction" from the state courts. The Court then made clear that once this was done, prosecutions could then be brought for conduct occurring before the narrowing construction was made, and proper convictions could stand so long as the defendants were not deprived of fair warning. 380 U. S., at 491, n. 7. The kind of relief granted in *Dombrowski* thus does not effectively eliminate uncertainty as to the coverage of the state statute and leaves most citizens with virtually the same doubts as before regarding the danger that their conduct might eventually be subjected to criminal sanctions. The chilling effect can, of course, be eliminated by an injunction that would prohibit any prosecution whatever for conduct occurring prior to a satisfactory rewriting of the statute. But the States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings. Thus, in *Dombrowski* itself the Court carefully

reaffirmed the principle that even in the direct prosecution in the State's own courts, a valid narrowing construction can be applied to conduct occurring prior to the date when the narrowing construction was made, in the absence of fair warning problems.

Moreover, the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Mine Workers v. Illinois Bar Assn.*, 389 U. S. 217 (1967). Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.

Beyond all this is another, more basic consideration. Procedures for testing the constitutionality of a statute "on its face" in the manner apparently contemplated by *Dombrowski*, and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from

its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. Ever since the Constitutional Convention rejected a proposal for having members of the Supreme Court render advice concerning pending legislation⁵ it has been clear that, even when suits of this kind involve a "case or controversy" sufficient to satisfy the requirements of Article III of the Constitution, the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, see, e. g., *Landry v. Daley*, 280 F. Supp. 938 (D. C. N. D. Ill. 1968), reversed *sub nom. Boyle v. Landry*, *post*, ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

⁵ See 1 The Records of the Federal Convention 1787 (Farrand ed. 1911) 21.

For these reasons, fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution, we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridges First Amendment rights. There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the *Buck* case, *supra*, we indicated:

"It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

313 U. S., at 402.

Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to

consider whether 28 U. S. C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.

The judgment of the District Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

For opinion of MR. JUSTICE DOUGLAS dissenting in this case see No. 4.

SUPREME COURT OF THE UNITED STATES

No. 2.*—OCTOBER TERM, 1970

Evelle J. Younger, Appellant,
v.
John Harris, Jr., et al. } On Appeal From the
United States District
Court for the Central
District of California.

[February 23, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, concurring.

The questions the Court decides today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals only with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court.

In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U. S. C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by

*Together with No. 4, *John S. Boyle et al. v. Lawrence Landry et al.*, on appeal from the United States District Court for the Northern District of Illinois; No. 7, *George Samuels et al. v. Thomas J. Mackell et al.*, and No. 9, *Fred Fernandez v. Thomas J. Mackell et al.*, on appeals from the United States District Court for the Southern District of New York; No. 41, *Frank Dyson et al. v. Brent Stein*, on appeal from the United States District Court for the Northern District of Texas, and No. 83, *Garrett H. Byrne et al. v. Serafim Karalexis et al.*, on appeal from the United States District Court for the District of Massachusetts.

§ 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983.¹ And since all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently.² Finally, the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions.

The Court confines itself to deciding the policy considerations that in our federal system must prevail when federal courts are asked to interfere with pending state prosecutions. Within this area, we hold that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.³

¹ See also *Cameron v. Johnson*, 390 U. S. 611, 613-614 n. 3; *Dombrowski v. Pfister*, 380 U. S. 479, 484 n. 2.

² Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. See *Younger v. Harris*, *ante*, at 6; *Douglas v. City of Jeannette*, 319 U. S. 157, 163-164. The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.

³ Cf. *Law Students Civil Rights Research Council v. Wadmond*, — U. S. —; *Wisconsin v. Constantineau*, — U. S. —; *Rosado v. Wyman*, 397 U. S. 397.

These considerations would not, to be sure, support any distinction between civil and criminal proceedings should the ban of 28 U. S. C. § 2283, which makes no such distinction, be held unaffected by 42 U. S. C. § 1983.

⁴ The negative pregnant in this sentence—that a federal court may, as a matter of policy, intervene when such "exceptional and extremely limited circumstances" are found—is subject to any further limitations that may be placed on such intervention by 28 U. S. C. § 2283.

Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face, *Younger v. Harris, ante*, at 16; cf. *Evers v. Dwyer*, 358 U. S. 202, or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement, *Younger v. Harris, ante*, at 9-12. In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process which is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights. Cf. *Georgia v. Rachel*, 384 U. S. 780.

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[February 23, 1971]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, concurring in the result.

I agree that the judgment of the District Court should be reversed. Appellee Harris had been indicted for violations of the California Criminal Syndicalism Act before he sued in federal court. He has not alleged that the prosecution was brought in bad faith to harass him. His constitutional contentions may be adequately adjudicated in the state criminal proceeding, and federal intervention at his instance was therefore improper.*

*The District Court erroneously interpreted *Zwickler v. Koota*, 389 U. S. 241 (1967), as authorizing federal court consideration of a constitutional claim at issue in a pending state proceeding, whether or not the federal court plaintiff had presented his claim to the state court. It suffices here to note that in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court. The court below also thought it significant that appellee Harris had raised his constitutional claim in the state courts in a motion to dismiss the indictment and in petitions in the state appellate courts for a writ of prohibition. It was questioned at oral argument whether constitutional issues could properly be raised by the procedures invoked by Harris, and it was suggested that the denial of Harris' motions did not necessarily involve rejection of his constitutional claims. However, even if the California courts had at that interlocutory stage rejected Harris' constitutional arguments, that rejection would not have provided a justification for intervening by the District Court. Harris could have sought direct review of that

Appellees Hirsch and Dan have alleged that they "feel inhibited" by the statute and the prosecution of Harris from advocating the program of the Progressive Labor Party. Appellee Broslawsky has alleged that he "is uncertain" whether as an instructor in college history he can under the statute give instruction relating to the Communist Manifesto and similar revolutionary works. None of these appellees has stated any ground for a reasonable expectation that he will actually be prosecuted under the statute for taking the actions contemplated. The court below expressly declined to rely on any finding "that . . . Dan, Hirsch or Broslawsky stand[s] in any danger of prosecution by the [State], because of the activities they ascribed to themselves in the complaint . . ." It is true, as the court below pointed out, that "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law," *Baggett v. Bullitt*, 377 U. S. 360, 373 (1964), but still there must be a live controversy under Article III. No threats of prosecution of these appellees are alleged. Although Dan and Hirsch have alleged that they desire to advocate doctrines of the Progressive Labor Party, they have not asserted that their advocacy will be of the same genre as that which brought on the prosecution of Harris. In short, there is no reason to think that California has any ripe controversy with them. See *Golden v. Zwickler*, 394 U. S. 103 (1969); *Perez v. Ledesma*, post. (Opinion of BRENNAN, J.)

rejection of his constitutional claims or he could have renewed the claims in requests for instructions, and on direct review of any conviction in the state courts and in this Court. These were the proper modes for presentation and these the proper forums for consideration of the constitutional issues.